# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1962

No. 283

WARD LANE, WARDEN, PETITIONER,

*vs.*

GEORGE ROBERT BROWN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JULY 28, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

# SUPREME COURT OF THE UNITED STATES

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## INDEX



RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 26, 1962

[fol. 1]

# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

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UNITED STATES OF AMERICA ex rel., GEORGE ROBERT BROWN,
Petitioner-Appellee,

v.

WARD LANE, as Warden of the Indiana State Prison,
Respondent-Appellant.

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CHRONOLOGICAL LIST OF DOCKET ENTRIES IN THE COURT BELOW

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|---|---|
| 7/20/61 | Petition for writ of habeas corpus, petition for stay of execution and for appointment of counsel. |
| 7/20/61 | Order entered granting leave to sue in forma pauperis, appointment of counsel, and rule to show cause. |
| 7/26/61 | Hearing on petition for writ of habeas corpus, amended motion for stay of execution filed. |
| 7/26/61 | Amended petition for writ of habeas corpus filed. |
| 7/26/61 | Arguments of counsel made, stay order entered, etc. |
| 8/29/61 | Respondent files return and answer to writ of habeas corpus. |
| 10/27/61 | Petitioner files petition to require the Atty. Gen. to report action taken on order of court entered. |
| 10/27/61 | Court order extending time for respondent to report what action in compliance with July 26, 1961 order been taken. |
| 11/ 6/61 | Respondent files response to court order of Oct. 27, 1961. |

11/ 8/61 Respondent files amended response to court order of Oct. 27, 1961 with certificate of service.

{fol. 2}

11/ 9/61 Order entered by the court that the respondent show cause why the petitioner should not be released.

11/16/61 Hearing held on rule to show cause order, Petitioner ordered released, also ordered remanded to the custody of the Warden until appeal is heard, under Rule 11(c) USCA.

11/16/61 Respondent files petition to remand petitioner to custody of Warden.

11/16/61 Respondent by Attorney General files NOTICE OF APPEAL to U. S. Court of Appeals.

11/24/61 Respondent by Attorney General filed Amended Notice of Appeal.

12/ 2/61 Respondent by Attorney General files petition for Certificate of Probable cause.

12/ 7/61 Order entered granting Certificate of Probable cause.

Clerk's Certificate.

[fol. 5]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

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UNITED STATES OF AMERICA ex rel., GEORGE ROBERT BROWN, Petitioner,

vs.

WARD LANE, as Warden of the Indiana State Prison, Respondent.

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To: The Honorable Robert A. Grant, Presiding Judge of the United States District Court for the Northern District of Indiana, South Bend Division.

MOTION FOR LEAVE TO FILE AND PROCEED IN FORMA PAUPERIS

Comes now George Robert Brown, the Relator in the attached Verified Petition for a Writ of Habeas Corpus, and respectfully moves this Honorable Court for leave to file said petition in this Court and proceed therein *in forma pauperis*, without prepayment of fees and costs or security therefor, as provided by *New Title* 28 U. S. C., Section 1915(a), and other Laws of the United States of America; and that Relator's affidavit in support of such motion is attached hereto.

Respectfully submitted,

George Robert Brown, Relator.

[fol. 6] State of Indiana,
County of LaPorte, ss.:

RELATOR'S AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE AND PROCEED IN FORMA PAUPERIS—July 18, 1961

George Robert Brown, having been first duly sworn according to law, upon his oath deposes and says:

That I am the same George Robert Brown who is the Relator in the foregoing Motion for Leave to File and Proceed in Forma Pauperis and the Verified Petition for a Writ of Habeas Corpus submitted therewith; that I am a citizen of the United States of America, having been born therein, and am now residing in the State of Indiana as a prisoner in the Indiana State Prison, within the jurisdiction of this Court; that I desire to commence and prosecute an action in this Court in the nature of a proceeding for a writ of *habeas corpus*, the petition for such writ being attached hereto and presenting to this Honorable Court grave and meritorious questions concerning the detention and pending execution of Relator by Respondent in flagrant violation of the "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment to the Constitution of the United States of America, as is more fully set forth in said petition; that I verily believe that I am entitled to the redress I seek in said action and the same is neither frivolous nor malicious; and that I am unable to pay the customary fees or costs necessary to the commencement and prosecution of said action and cannot give security therefor, in that I do not possess more than five dollars ($5.00) in unencumbered funds; and I have no property which I [fol. 7] could liquidate or other means to pay such fees or costs or give security therefor.

George Robert Brown, Relator-Affiant.

Subscribed and sworn to before me, the undersigned Notary Public, this 18th day of July, 1961.

Edwin A. Gobel, Notary Public, County of LaPorte, State of Indiana.

(seal)

My Commission Expires: 4-10-65.

[fol. 8]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

[Title omitted]

To: The Honorable Robert A. Grant, Presiding Judge of the United States District Court for the Northern District of Indiana, South Bend Division.

MOTION FOR APPOINTMENT OF COUNSEL—July 20, 1961

Comes now George Robert Brown, the Relator in the attached Verified Petition for a Writ of Habeas Corpus, and respectfully moves this Honorable Court to appoint a competent attorney to represent the Relator in the prosecution and disposition of said petition, as authorized by *New Title* 28 U. S. C., Section 1915(d), and other laws of the United States of America, and respectfully avers and shows:

1.

That Relator is without sufficient funds, means or property to retain private counsel to represent him in this action, in that he does not possess more than five dollars [fol. 9] ($5.00) in unencumbered funds and has no property which he could liquidate or other means to retain counsel to represent him; that Relator knows of no attorney who would represent him in this cause *gratis* and without a substantial retainer fee having first been paid therefor.

2.

Relator further avers that the services of Indiana's Public Defender, Honorable Robert S. Baker, are not available to Relator in this cause; that the said Public Defender has refused to and will not represent Relator, as evidenced by the following letter received by Relator:

January 22, 1960

"Dear Sir:

Please find enclosed a copy of a letter sent to you last March explaining why we can't represent you in the Federal courts.

Yours truly,

ROBERT S. BAKER
Public Defender
State of Indiana"

(Enclosure)

March 4, 1959

"Dear Sir:

When I talked with you last Sunday, March 1st, I indicated to you that I would represent you, and file a petition in the Supreme Court of the United States for a writ of certiorari.

I have since reconsidered the matter of whether or not I have any authority, as Public Defender of Indiana, to represent any person in any penal institution of Indiana, on any question or in any proceedings involv- [fol. 10] ing the filing and/or hearing in the Federal Courts.

I have come to the conclusion that it was the intention of the General Assembly of Indiana, when it created the Office of Public Defender of Indiana, that the duties of his office should be confined to proceedings in the State Courts of Indiana and not in the Federal Courts, whether it be the Federal District Court, the Federal Court of Appeals or the United States Supreme Court.

I am therefore withdrawing from your case.

You have the right to file any petition in the Federal Courts, per se, in forma pauperis, that you believe proper.

I am enclosing herewith the papers and material I received from you last Sunday.

Yours truly,

ROBERT S. BAKER
Public Defender
State of Indiana"

3.

Relator further avers that he is without the requisite skill and knowledge to properly conduct the instant proceedings in this Honorable Court, without the aid and assistance of a competent attorney, in that Relator is an uneducated layman, having only an 8th grade, grammar school, education, and is unfamiliar with law and legal procedure.

4.

That Relator verily believes that he is entitled to the redress he seeks in this action for writ of *habeas corpus* and said action is neither frivolous nor malicious but presents grave and meritorious questions of Relator's detention and pending execution by Respondent in flagrant vio- [fol. 11] lation of the "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment to the Constitution of the United States of America, as is more fully set forth in the petition for the writ.

5.

That, unless this Court grant the instant motion and appoint counsel as prayed herein, the Relator will be unable to properly and sufficiently present his complaint to the Court and obtain a full and fair hearing thereof and will thereby be denied his "day in court" contemplated by the laws and Constitution of the United States.

Wherefore, for each and all of the foregoing reasons, the Relator respectfully moves this Honorable Court to sustain the instant Motion for Appointment of Counsel and appoint some competent attorney to represent Relator in the prosecution and disposition of his attached Verified Petition for

a Writ of Habeas Corpus, and for all other relief deemed mete and just in the premises.

Respectfully submitted,

George Robert Brown, Relator.

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State of Indiana,
County of LaPorte, ss.:

Verification

George Robert Brown, having been first duly sworn according to law, upon his oath deposes and says:

That I am the same George Robert Brown who is the Relator in the foregoing Motion for Appointment of Counsel [fol. 12] and the Verified Petition for a Writ of Habeas Corpus submitted therewith, that I have read and examined the said foregoing motion, and that the matters and facts therein alleged are true, and I so swear.

George Robert Brown, Relator-Affiant.

Subscribed and sworn to before me, the undersigned Notary Public, this 18th day of July, 1961.

Edwin A. Gobel, Notary Public, County of LaPorte, State of Indiana.

(Seal)

My Commission Expires: 4-10-65.

[fol. 13]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

[Title omitted]

To: The Honorable Robert A. Grant, Presiding Judge of the United States District Court for the Northern District of Indiana, South Bend Division.

MOTION FOR LEAVE TO AMEND VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS

Comes now George Robert Brown, the Relator in the attached Verified Petition for a Writ of Habeas Corpus, and respectfully moves this Honorable Court for leave to amend said petition in substance or form in the event the Court appoints counsel to represent Relator, as prayed in the Motion for Appointment of Counsel presented herewith, and for reason therefor, respectfully submits:

1.

That Relator is an ignorant layman, unskilled in the law and procedure, and without the requisite knowledge to properly draft his petition and present his complaint to [fol. 14] this Court; that Relator is wholly unable to properly plead his cause to this Court without the assistance of counsel.

2.

That Relator is without funds to employ counsel to represent him in this cause and assist him in preparing his pleadings; that he is forced to rely upon another inmate of the Indiana State Prison for the preparation of said pleadings, and that such inmate is not a lawyer and is likewise unskilled in the law and procedure necessary for the maintenance of the instant petition.

That Relator verily believes he has a meritorious complaint, that he has presented such complaint to the best of his limited ability and with the only assistance available to him; and that should his grievances be properly presented to this Honorable Court the relief prayed for will be granted.

Respectfully submitted,

George Robert Brown, #29748, Box 41, Indiana State Prison, Michigan City, Indiana, Relator, Pro Se.

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[fol. 15]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

[Title omitted]

To: The Honorable Robert A. Grant, Presiding Judge of the United States District Court for the Northern District of Indiana, South Bend Division.

VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS—
Filed July 20, 1961

Comes now The United States of America, on the Relation of George Robert Brown, as the Petitioner, and complains of the Respondent, Ward Lane, as Warden of the Indiana State Prison, and for cause of action arising under the Laws and Constitution of the United States of America, states:

1.

This Court has jurisdiction to entertain this petition for writ of *habeas corpus* by virtue of *New Title* 28 U. S. C., § 2241, and has jurisdiction to grant said petition, in that Relator has exhausted all remedies available and thought to have been available to him in the courts of Indiana for [fol. 16] redress of the grievances presented herein, and in

that there is an absence of available State corrective process and the existence of circumstances rendering such process ineffective to protect the rights of the Relator, as contemplated by *New Title* 28 U. S. C., § 2254, in all of the following facts and circumstances, to-wit:

a. That Relator was charged, tried and convicted in the Lake County, Indiana, Criminal Court of the offense of Murder in the Perpetration of Robbery and sentenced to death, of which judgment and sentence Relator now complains.

b. That Relator filed a timely Motion for New Trial in the Lake Criminal Court, the same being overruled on the 3rd day of February, 1958.

c. That a timely Appeal to the Indiana Supreme Court was subsequently made herein; that the Indiana Supreme Court heard said appeal, and, on the 17th day of December, 1958, rendered its opinion affirming the judgment and sentence of the Lake Criminal Court, as is more fully shown in *Brown* v. *State*, 1958, —— Ind. ——, 154 N. E. 2d 720; and that a timely Petition for Rehearing was thereafter filed and the same was denied by the Indiana Supreme Court on the 10th day of February, 1959.

d. That Relator thereafter petitioned the Supreme Court of the United States for a writ of *certiorari*, said petition being filed in that Court on the 25th day of March, 1959, and docketed as *No. 738 Miscellaneous, October Term, 1958*; that the United States Supreme Court thereafter identified said petition as: "*Brown* v. *Indiana*, No. 14 Misc., October Term, 1959," and, on the 11th day of January, 1960, the said Court therein entered the following Order:

> "The petition for writ of certiorari is denied without prejudice to an application for writ of habeas corpus [fol. 17] in the appropriate United States District Court."

e. That thereafter, on or about February 18, 1960, the Relator filed a Verified Petition for Writ of Habeas Corpus in this Honorable Court, which petition was denied by this Court in the following Order entered on the 26th day of February, 1960, to-wit:

"Petitioner's request to proceed in forma pauperis is hereby granted.

"Petition for Writ of Habeas Corpus is hereby ordered filed.

"Petition denied, inter alia, as petitioner fails to set out substantial facts showing that he has exhausted his available State remedies, as more fully explained below.

"In his petition, petitioner alleges, as grounds for the issuance of the Writ, the following:

"(1) Inadequate representation by Court-appointed Counsel at his trial in Lake County, Indiana Criminal Court.

"(2) Procurement by State authorities of a confession from petitioner through fear produced by threats and prolonged questioning during an illegal detention.

"(3) Admission of confession before proof of the corpus delicti.

"(4) Admission into evidence of exhibits and testimony of petitioner's prior commitment to a mental institution and crimes of rape and attempted rape alleged to have been committed by the petitioner.

"While it is clear that the petitioner has exhausted his available State remedies in regard to the grounds numbered above as three and four (See: Brown v. State, —— Ind. ——, 154 N. E. 2d 720 (1958)), it is equally clear that petitioner has never brought the [fol. 18] matters alleged in grounds numbered one and two, above, to the attention of the courts of the State of Indiana. It is fundamental that petitioner do this before this Court will be justified in entertaining a Petition for Writ of Habeas Corpus on its merits. 28 U. S. C. A. § 2254.

"Therefore, this Court is dismissing petitioner's Petition for Writ of Habeas Corpus without prejudice to petitioner's right, if any, to present a subsequent petition for relief at such time when he has exhausted his State remedies by presenting the mat-

ters alleged in numbers one and two, above, to the courts of Indiana by way of Writ of Error Coram Nobis or any other procedure available to him."

f. That Relator thereafter, on May 10, 1960, filed in the Lake Criminal Court a Verified Petition for Writ of Error Coram Nobis, wherein he presented the questions noted as one (1) and two (2) in this Court's Order of February 26, 1960, in the above cause; that a hearing was had thereon in the Lake Criminal Court on the 1st day of June, 1960, at which time the said Court overruled and denied same.

g. That Relator thereafter requested the Public Defender of Indiana to represent him in perfecting an appeal to the Indiana Supreme Court from the Order overruling the said *coram nobis* petition, but that officer declined to assist Relator or furnish him with a transcript so that he might perfect an appeal himself; that Relator then filed in the Lake Criminal Court a timely Motion to Appoint Counsel and Furnish Transcript of Record, but such motion was denied by said Court on the 14th day of July, 1960.

h. That thereafter, on or about the 20th day of July, 1960, Relator filed in the Indiana Supreme Court a Verified [fol. 19] Petition for a Writ of Mandate, wherein he prayed that Court to direct the Lake Criminal Court to appoint counsel for Relator and furnish him with a certified copy of the lower court's record and transcript of the *coram nobis* hearing, in order that Relator could appeal to the Indiana Supreme Court from the Order overruling and denying his *coram nobis* petition; that the Indiana Supreme Court, on the 2nd day of February, 1961, denied the petition for writ of mandate, in an opinion reported as *Brown* v. *State* (1961), —— Ind. ——, 171 N. E. 2d 285. (This case was docketed in the Indiana Supreme Court as No. O-604.)

i. That thereafter, on the 27th day of March, 1961, Relator filed a Petition for Writ of Certiorari in the United States Supreme Court, wherein he prayed that Court to review the opinion of the Indiana Supreme Court denying Relator's Verified Petition for Writ of Mandate; that said petition for writ of *certiorari* was docketed in the United

States Supreme Court as *Brown* v. *Indiana, No. 953 Miscellaneous, October Term, 1960*, and, on the 12th day of June, 1961, was denied by that Court in the following Order:

> "Petition for writ of certiorari to the Supreme Court of Indiana denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court, it appearing from the papers submitted that the State is prepared to concede that petitioner has exhausted state remedies. Mr. Justice Douglas would grant the petition for certiorari and reverse the judgment below on the authority of *Smith* v. *Bennett*, 365 U.S. 708."

j. That there now exists in Indiana no available procedure by which Relator has the right under the law of the State to raise any of the questions presented in the instant petition.

2.

[fol. 20] That Relator is unlawfully imprisoned, restrained of his liberty and detained in the Indiana State Prison, at Michigan City, LaPorte County, Indiana, under color of authority of the State of Indiana, and in the custody of Ward Lane, as Warden of said prison, which is located within the territorial jurisdiction of this Court. That the sole claim and authority by virtue of which Respondent so restrains Relator is a commitment of the Lake County, Indiana, Criminal Court, (hereinafter referred to as the Trial Court), which commitment was made in Cause No. 30120 and is now held by Respondent under the following circumstances:

3.

That, on the 13th day of December, 1957, Relator was adjudged guilty of Murder in the Perpetration of Robbery and sentenced to death.

4.

That thereafter, on the 13th day of January, 1958, Relator filed a motion for new trial in said cause, which motion was overruled and denied by the Trial Court on the

3rd day of February, 1958; that said motion appears as follows:

"Comes now the defendant in the above entitled cause and moves the court for a new trial thereof, upon the following grounds and for the following reasons:

I. That the verdict of the jury is not sustained by sufficient evidence.

II. That the verdict of the jury is contrary to law.

III. Error of law occurring at the trial, in this: That the Court permitted the witness, Eli Uzelac, to [fol. 21] answer the following question put to him as a witness by the Prosecuting Attorney upon direct examination, over the objection of the defendant:

Question: 'What was the interrogation (of the defendant) there?' To which question objection was made by defendant, in substance, that the question asked the witness to relate to the jury extra-judicial admissions made by defendant to witness as to the crime charged, before there had been any independent proof made of the exact corpus delicti charged in the indictment, to-wit: murder by choking and strangulation in the perpetration of a robbery. This objection was by the Court overruled and said witness' answer, in substance, related to the jury in detail statements and admissions made to him by defendant in the nature of a complete confession of guilt of the crime charged..

IV. Error of law occurring at the trial in this: that the Court admitted into evidence and to be read to the jury, over the objection of the defendant, State's Exhibit No. 16, the same being Defendant's signed statement dated April 29, 1957, containing admissions by defendant of guilty involvement in the crime charged.

Objection was made by defendant that extra-judicial admissions of defendant are not admissible in evidence against him until the State had first adequately proved, by other competent evidence in the record, the exact corpus delicti charged in the indictment; that in this case the exact corpus delicti charged in the indictment

was murder by choking and strangulation in the perpetration of a robbery; that in this case the State had not established by other competent evidence that the exact crime of murder by strangulation in the perpetration of a robbery had been committed by anyone, and, therefore, defendant's extra-judicial signed statement, said State's Exhibit No. 16, admitting such crime, [fol. 22] was not admissible against him. Defendant's objection was overruled by the Court and said State's Exhibit No. 16 was admitted into evidence and read to the jury.

Wherefore, the defendant prays the Court for a new trial of said cause."

5.

That an appeal to the Indiana Supreme Court was perfected in this cause, wherein Relator's (Appellant's) Assignment of Errors specified two causes for reversal of the judgment:

"I. That the Court erred in overruling appellant's motion for a new trial.

"II. That appellant's trial was without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America."

that the Indiana Supreme Court heard said appeal, and, on the 17th day of December, 1958, rendered its Opinion affirming said judgment of the Trial Court, as is more fully shown in: *Brown* v. *Indiana*, 1958 —— Ind. ——, 154 N. E. 2d 720; that a petition for rehearing was thereafter filed in the Indiana Supreme Court and denied on the 10th day of February, 1959.

6.

Relator would further respectfully show that after the Indiana Supreme Court denied a rehearing in this cause on the 10th day of February, 1959, Relator requested the services of Attorney Robert S. Baker, Public Defender for the State of Indiana, in representing Relator in this cause,

but the Public Defender has steadily refused to represent Relator in any Federal Court proceedings, and Relator can- [fol. 23] not obtain his services in prosecuting the instant petition; that Relator, acting without counsel and without vitally necessary court records, nevertheless, with the help of another inmate who is not a lawyer, prepared and, on the 25th day of March, 1959, filed an application for writ of certiorari in the United States Supreme Court, where said application was docketed as *No. 738 Miscellaneous, October Term, 1958;* that the United States Supreme Court thereafter identified said application as: *Brown v. Indiana, No. 14 Misc., October Term, 1959,* and, on the 11th day of January, 1960, the Court therein entered the following Order:

> "The petition for writ of certiorari is denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court."

7.

That thereafter, on or about the 18th day of February, 1960, the Relator filed his application for a writ of habeas corpus in this Honorable Court, wherein he alleged, as grounds for the issuance of the writ, the following:

(1) Inadequate representation by Court-appointed counsel at his trial in Lake County, Indiana Criminal Court.

(2) Procurement by State authorities of a confession from petitioner (Relator herein) through fear produced by threats and prolonged questioning during an illegal detention.

(3) Admission of confession before proof of the corpus delicti.

(4) Admission into evidence of exhibits and testimony of petitioner's prior commitment to a mental institution and crimes of rape and attempted rape alleged to have been committed by the petitioner.

[fol. 24] that this Court, on the 26th day of February, 1960, entered an Order in this cause holding that Relator had failed to present the matters alleged in numbers one and two, above, to the courts of Indiana and, therefore, he had failed to exhaust his State remedies, and wherein this Court concluded:

> "Therefore, this Court is dismissing petitioner's Petition for Writ of Habeas Corpus without prejudice to petitioner's right, if any, to present a subsequent petition for relief at such a time when he has exhausted his State remedies by presenting the matters alleged in numbers one and two, above, to the courts of Indiana by way of Writ of Error Coram Nobis or any other procedure available to him."

8.

That thereafter, on or about the 10th day of May, 1960, the Relator filed in the Trial Court a Verified Petition for Writ of Error Coram Nobis, wherein he alleged, as grounds therefor, the following:

(1) Inadequate representation by Court-appointed counsel at his trial in Lake County, Indiana Criminal Court.

(2) Procurement by State authorities of a confession from petitioner (Relator herein) through fear produced by threats and prolonged questioning during an illegal detention.

(3) Admission of confession before proof of the corpus delicti.

(4) Admission into evidence of exhibits and testimony of petitioner's prior commitment to a mental institution and crimes of rape and attempted rape alleged to have been committed by the petitioner.

[fol. 25] that hearing was had on said petition in the Trial Court on the 1st day of June, 1960, at which time the said Court overruled and denied said petition.

9.

Relator further avers that following the Trial Court's action in denying his coram nobis petition, and on or about the 29th day of June, 1960, he filed in the Trial Court a Motion to Appoint Counsel and Furnish Transcript of Record for appeal to the Supreme Court of Indiana; that said motion was considered and overruled by the Trial Court on the 14th day of July, 1960, in the following Order:

> "Comes now the State of Indiana by its Prosecuting Attorney in open court, and the defendant's Motion to Appoint Counsel and Furnish Transcript of Record is now submitted to the Court for hearing and the Court having examined said motion and being fully advised in the premises, finds that the motion be denied.
>
> It is therefore considered, adjudged and decreed by the Court that the Motion to Appoint Counsel and Furnish Transcript of Record of the Error Coram Nobis proceedings, filed herein on the 29th day of June, 1960, be and the same is hereby overruled and denied."

10.

That thereafter, on or about the 21st day of July, 1960, Relator filed in the Supreme Court of Indiana a Verified Petition for Writ of Mandate, wherein he prayed the Court issue a writ of mandate to the Trial Court to furnish Relator with a certified copy of the error coram nobis proceedings and to appoint counsel in order that Relator might perfect an appeal in said proceedings; that said [fol. 26] petition for writ of mandate was heard by the Indiana Supreme Court and denied on the 2nd day of February, 1961, the same being identified in that Court as *Brown* v. *State*, No. O-604, and reported at —— Ind. ——, 171 N. E. 2d 285.

11.

That Relator thereafter, on or about the 28th day of March, 1961, filed his Petition for Writ of Certiorari in the Supreme Court of the United States, wherein he prayed

the Court review the opinion of the Indiana Supreme Court denying Relator's petition for writ of mandate, and which petition for writ of certiorari was docketed in the United States Supreme Court as *Brown* v. *Indiana, No. 953 Miscellaneous, October Term, 1960;* that on the 12th day of June, 1961, said Court denied the application for writ of certiorari in said cause and entered the following Order:

> "Petition for writ of certiorari to the Supreme Court of Indiana denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court, it appearing from the papers submitted that the State is prepared to concede that petitioner has exhausted state remedies. Mr. Justice Douglas would grant the petition for certiorari and reverse the judgment below on the authority of *Smith* v. *Bennett,* 365 U. S. 708."

12.

Relator would respectfully urge that he was denied due process of law and equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution, by the action of the Trial Court in appointing an incompetent attorney to represent and defend [fol. 27] Relator during the trial of this cause; that said attorney rendered only perfunctory service to your Relator, made an ineffective defense, did not conduct Relator's defense in accordance with the procedural rules necessary to perfect a trial record that would enable Relator to have an adequate appeal for error; that the appearance of said attorney was pro forma rather than zealous and active; that the appointment of an incompetent attorney made Relator's trial in this cause a farce and a mere pretense; that Relator's right to have the service of a competent and faithful attorney to prepare his defense in the trial of this cause was thereby denied; that the Trial Court appointed Attorney T. Cleve Stenhouse, of C[illegible]wn Point, Indiana, to act as counsel and to represent Rel[illegible]tor during said trial; that the Trial Court thereby denied Relator a fair and impartial and full trial; that the Trial Court failed, refused and neglected to enforce Relator's constitutional

right to have the assistance of competent counsel; that Relator did not by word or deed waive his right to have counsel; that, at the time of said trial Relator had never read the Constitution of the United States nor the Constitution of Indiana and did not know that the State was required to afford him certain rights or what his rights were under either Constitution; that Relator was unfamiliar with the law and the rules of legal procedure and did not understand his legal or constitutional rights; that Relator had, therefore, to rely wholly upon the court-appointed attorney herein to defend his rights and secure him a fair trial of the issues; that said attorney did not protect Relator's rights during said trial; that said attorney did not make an objection, as required by law and the Rules of the Supreme Court of Indiana, when the State offered an alleged confession of Relator during said trial, though Relator had theretofore advised said attorney of facts that [fol. 28] tend to suggest that said alleged confession was inadmissible for any purpose and should have been vigorously objected to by said attorney; that by failing to so object, said attorney deprived Relator of his right to present any question attacking said confession to the Supreme Court of Indiana in the appeal subsequently made thereto in this cause; that the defense made herein by said attorney was perfunctory and inadequate and did not invoke the principles of law and evidence favorable to this Relator; that, during the trial of this cause it was indisputably true that Relator was legally required to be cloaked with the presumption of innocence, and that the State of Indiana, in order to authorize conviction, was required to lawfully prove Relator guilty beyond a reasonable doubt, but the State of Indiana did not *lawfully* establish Relator's guilt herein; that the State of Indiana unlawfully obtained said alleged confession and unconstitutionally used said confession to bring about Relator's conviction herein, and that Relator's attorney did not object to the admission of said confession nor attempt to show the facts and circumstances by which it had been obtained to the Trial Court or jury; that Relator's conviction and sentence were brought about almost entirely by said alleged confession; that there was little, if any, evidence introduced during said trial, aside

from said alleged confession, to establish Relator's guilt or even that a crime had been committed by anyone; that said court-appointed attorney neglected, failed and refused to make any objection when the State of Indiana offered and introduced said alleged confession; that said attorney's attitude toward Relator was hostile, unfriendly and disinterested because of the nature of the crime charged herein, and he did not pay attention even when Relator tried to inform him of the facts and circumstances surrounding the alleged making and signing of said alleged confession; that [fol. 29] prior to said trial Relator had informed said attorney of facts and circumstances pertaining to the making and signing of said confession that tend to suggest that it was wholly inadmissible in the trial of this cause; that said confession had been obtained in violation of Relator's rights under the Fourteenth Amendment to the Constitution of the United States, in that Relator made and signed said confession only because he was influenced by fear, produced by threats, intimidation, coercion, duress, and undue influence by law enforcement officers during a period of questioning that continued intermittently for a period of approximately two (2) weeks; that Relator is an ignorant uneducated person, with no knowledge of law or his constitutional rights; that Relator failed to complete even common school; that the evidence given by the State of Indiana in the trial of this cause disclosed that, more than five (5) years prior to this trial, Relator had been *committed to the Doctor Norman Beatty Hospital*, at Westville, Indiana, on the 4th day of June, 1952, as a Criminal Sexual Psychopath; that Relator remained in the Norman Beatty Hospital until the 18th day of April, 1953, on which date he was *committed to the Indiana Hospital for Insane Criminals*, at Michigan City, Indiana, as #27914, and that Relator was confined as a patient in the Indiana Hospital for Insane Criminals until the 20th day of July, 1954, when Relator was returned to the Doctor Norman Beatty Hospital; that Relator was thereafter given *convalescent leave* and, on the 10th day of October, 1955, allowed to leave said Doctor Norman Beatty Hospital and return to his home in Gary, Indiana; that, therefore, on the date of the alleged

commission of the crime charged herein, Relator was then *still a patient on convalescent leave from Doctor Norman Beatty Hospital;* that your Relator was arrested and charged with Vehicle Taking on or about the 15th day of [fol. 30] April, 1957, and thereafter confined in the Lake County Jail, at Crown Point, Indiana, where Deputy Sheriffs at once began to accuse Relator of numerous unsolved crimes in Lake County, including the murder and robbery of Mildred Grigonis; that Relator denied knowing anything at all about said crimes for several days; that three Deputy Sheriffs interrogated Relator many times, usually for several hours every day, for a period of about two (2) weeks after his arrest, frequently they removed Relator from the Lake County Jail and took Relator to his home, which home was then illegally searched several times; that said Deputy Sheriffs also took Relator to other places in Lake County thought to have some connection with the crime charged herein; that said Deputy Sheriffs sought to elicit, incriminating admissions from Relator on all these trips; that on another occasion, said Deputy Sheriffs were taking Relator out of said jail when an attorney, (Relator does not know his name), was in the waiting room and asked to see Relator; that one of the Deputy Sheriffs in charge of said jail came over to Relator and asked:

"Do you know this lawyer?"

Relator replied that he did not know him but would like to talk to him, whereupon the Deputy Sheriff said:

"You don't need a lawyer now. When you do, the State will furnish one."

Then said Deputy Sheriff went over to the lawyer and said:

"Brown don't want to see you."

The attorney left the jail and Relator did not get to talk to him; that said Deputy Sheriffs then removed Relator from said jail and took him by automobile to a place near Hobart, Indiana, where the car belonging to Mildred Grigonis, the alleged victim herein, had been recovered; there

[fol. 31] they questioned Relator at great length about said car; that one of the Deputies there told Relator:

> "You are sick. You don't have nothing to worry about. All they can do is put you back in the nut house."

But the other two Deputy Sheriffs were angry because Relator persisted in denial of knowledge of the crime charged and they accused him of lying and warned him that he, Relator, had been lying in denying guilt and that he had now better come clean and tell the truth or that he would never see his baby again; that Relator frequently requested permission to see his baby, his wife, and his mother; that the Deputy Sheriffs said, in substance:

> "If you make a full confession I'll bring your baby here and sit him right on this desk. If you don't tell us everything we want to know you will never see your baby again. I can't promise you that you will be out in a year—but you will have a good chance in five years."

While confined in the Lake County Jail, Relator was told by a Deputy Sheriff, in substance:

> "Mildred Grigonis is a blood relative of mine. If you don't make a confession and tell us where you hid the body, I'll come in that cell and hang you. I ought to come in there and hang you whether you confess or not."

That other Deputy Sheriffs were bitterly hostile toward Relator and one of them said:

> "We will put you in a dark hole if you don't tell us where you hid the body."

Relator was confused and frightened; he had withstood all efforts by said officers to make him confess and had refused to confess for about two (2) weeks, but the officers finally [fol. 32] broke his will to resist; that, through fear, produced by threats, and by prolonged questioning, Relator was induced to make a confession; that Relator just simply did not know what else to do; that, during the two (2) weeks

Relator had been confined in the Lake County Jail, he had frequently requested permission to see his baby and his family, but his requests had all been denied; Relator had also asked to consult with an attorney, but this request too was denied; that this Relator was in a greatly confused mental condition during his confinement in said jail, especially during the periods when said Deputy Sheriff questioned him about numerous unsolved crimes in Lake County and insisted that he clear them up; that said officers were not satisfied with Relator's denial of knowledge of said crimes and accused him of lying and concealing information; that the alleged confession in this case did not issue freely but was obtained by methods often condemned by the Federal courts; that the courts of the State of Indiana also have held that such confessions are not admissible, without corroborating evidence, *Section 9-1607, Burns' 1942 Replacement, Suter* v. *State*, 1949, —— Ind. ——, 88 N.E. 2d 386; that, once it is shown that lawless inquisitorial means have been used by the state's representatives for the purpose of procuring a confession, the trial court should reject said confession, *Kokenes* v. *State*, 1938, —— Ind. ——, 13 N.E. 2d 524, 531; that, where in this case, the defendant signed a confession after two (2) weeks of interrogation, without counsel and without being advised of his legal or his constitutional rights, the admissions in his confession were obtained in violation of due process of law, *Johnson* v. *State*, 1948, 226 Ind. 179, 78 N.E. 2d 161; that Relator is not complaining of a mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sen- [fol. 33] tence wholly void, *Moore* v. *Dempsey*, 261 U.S. 86, 91, 43 S. Ct. 265; *Chambers* v. *Florida*, —— U.S. ——, 50 S. Ct. 472, 479; *Brown* v. *Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 465; that the court-appointed attorney herein knew all the facts set out hereinabove, yet even under those circumstances he offered no objection, when the State of Indiana introduced said alleged confession into evidence during said trial; that the above was patently not a mere error in judgment but was a wrong so fundamental as to make the entire proceeding a mere pretense of a trial; that it is elementary that any competent attorney, zealous and faithful to the

interest of his client, under the facts and circumstances shown here would have objected most vigorously to the admission of such purported confession; that by failing to object, the attorney in this case greatly prejudiced Relator in making his defense and actually and unlawfully deprived Relator of a fair trial, in contravention of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

13.

Relator further avers that after his said arrest on or about the 15th day of April, 1957, he was not taken before a court or magistrate or judge until his arraignment on or about the 10th day of October, 1957; that Relator was, therefore, confined in the Lake County Jail for a period of approximately six (6) months before Indiana authorities took him before a court; that, while in such jail, Relator was not allowed to talk to any member of his family for more than thirty (30) days; that, following his arrest, Relator did not talk to, consult, or advise with any attorney for a period of approximately four (4) months; that it was too late then for an attorney to advise Relator of his rights; that even then said attorney refused to discuss the details [fol. 34] of his case; that said attorney did say however that he would be ready to defend Relator when his trial began; that said trial began on the 2nd day of December, 1957, and that the State of Indiana in the course of said trial relied almost entirely upon the purported confession of Relator to prove his guilt of the crime charged herein; that facts and circumstances were available to show that said confession had been obtained by Deputy Sheriffs of Lake County during a period of unlawful detention of Relator, in that the State of Indiana had failed, neglected, and refused to follow and obey the mandatory provisions of *Burns' Indiana Statutes*, Section 9-1024; *Suter* v. *State*, 1949, —— Ind. ——, 88 N.E. 2d 386, 391; *Watts* v. *State*, 1949, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. ——; and that said confession was obtained by methods and means violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and would not have been admissible upon proper objection thereto.

14.

Relator further contends that his trial in this cause was conducted under such circumstances as to deprive him of due process of law, in violation of his rights under the Fourteenth Amendment to the Constitution of the United States, in that the Trial Court denied Relator a full and fair trial; that the trial was partial and unfair; that the Supreme Court of the State of Indiana also denied Relator due process of law in affirming the judgment of the Trial Court herein and by refusing to grant Relator a new trial; that Relator was specifically charged with the crime of "MURDER IN THE PERPETRATION OF A ROBBERY"; that the the indictment, upon which this cause is based, omitting caption and signature, shows as follows:

> [fol. 35] "The Grand Jurors of Lake County, in the State of Indiana, good and lawful men, duly sworn and legally impaneled, charged and sworn to inquire into felonies and certain misdemeanors in and for the body of said County of Lake, in the name and by the authority of the State of Indiana, on their oaths present that one George Robert Brown of said County, on the 18th day of August, A.D. 1956, at said County and State aforesaid, did then and there unlawfully and feloniously kill and murder one Mildred Grigonis while he, the said George Robert Brown, was then and there engaged in unlawfully, feloniously and forcibly taking from the person of said Mildred Grigonis by violence and putting her, the said Mildred Grigonis, in fear, Two Hundred and Fifty ($250.00) Dollars in money, of the personal property of the said Mildred Grigonis; that the said George Robert Brown, at the time of and while e gaged in the perpetration of the robbery of the said Mildred Grigonis, as aforesaid, did then and there unlawfully and feloniously kill and murder the said Mildred Grigonis, by then and there unlawfully and feloniously seizing the said Mildred Grigonis about the neck and throat with his, the said George Robert Brown's hands and arms, then and thereby exerting great force and pressure upon the neck and throat of

the said Mildred Grigonis, then and there and thereby causing the said Mildred Grigonis to choke, suffocate and strangle, from which choking, suffocation and strangulation the said Mildred Grigonis then and there died, then and there being contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

That, during the trial of this cause "*There was no medical testimony whatsoever given with reference to the body.*" (See Brief filed by Relator in his appeal to the Indiana Supreme Court, page 43); that no medical testimony was [fol. 36] offered at any time in the trial to reveal the actual cause of death, and it is not shown by the trial record that the death of Mildred Grigonis was not brought about by natural causes; that there is a total absence of any medical evidence or testimony as to how long Mildred Grigonis had been dead, or as to what the condition of her body was when found, and *no doctor or other* expert witness gave evidence in the trial of this cause to establish the true cause of death; that, aside from the confession there was no evidence to show how long the body of the deceased had been buried; there was no evidence as to how long the body had been dead when found; there was no description of the condition of the body when found; there was no evidence of any autopsy of the body; there was no evidence of the cause of death; there was no evidence of the whereabouts of the deceased from the 17th day of August, 1956, until April 30, 1957, some eight months unaccounted for; that the State of Indiana relied wholly upon the purported confession of Relator to establish and prove all of the above matters; that your Relator would further show that in order for the State of Indiana *to prove the corpus delicti it is absolutely essential that proof be made in accordance with the indictment that Mildred Grigonis was murdered by some person engaged in the perpetration of the robbery charged;* that no such proof was made during the trial of this cause; that, aside from Relator's confession, there is no proof at all that Mildred Grigonis was either murdered or robbed; that, under the facts and circumstances of this particular case, the uncorroborated confession of Relator is insufficient to support his conviction; that the law of

Indiana requires that there must be independent proof of the confessed crime in order to show that it actually was committed; that is, there must be independent proof of the corpus delicti; there must be independent proof that [fol. 37] the crime charged has actually been committed by someone, *Hopkins* v. *State*, 1941, 219 Ind. 116, 27 N.E. 2d 79; that in the trial of this cause there was no independent proof that established the corpus delicti and the State of Indiana unlawfully used Relator's purported confession to establish the corpus delicti, and without independent proof of the corpus delicti, the confession is not admissible, *Parker* v. *State*, 1949, 228 Ind. 1, 88 N.E. 2d 556, 557; *Hunt* v. *State*, 1939, 216 Ind. 171, 178, 23 N.E. 2d 681; *Wharton's Criminal Law*, 12th Ed., Vol. 1, Section 347, p. 450; *14 Am. Jur., Criminal Law*, section 6, p. 58; *23 C.J.S. Criminal Law*, section 916, p. 181; that prior to the decision by the Indiana Supreme Court in the appeal thereto of this case, (*Brown* v. *State*, 1958, —— Ind. ——, 154 N.E. 2d 720), the rule was well established in Indiana that an extra-judicial confession will not be admitted into evidence until *after* the corpus delicti has been established by clear proof independent of the confession itself, *Gorges* v. *State*, 1921, 191 Ind. 262, 268, 132 N.E. 580; *Mossell* v. *State*, 1911, 167 Ind. 214, 219, 95 N.E. 565; *Griffith* v. *State*, 1904, 163 Ind. 555, 558, 72 N.E. 563; *Wharton's Criminal Law*, 12th Ed., Vol. 1, sections 359, 360; *Underhill's Criminal Law Evidence*, 4th Ed., Section 36; that in *Wharton's Criminal Law*, *supra*, it is said:

> "Where a person is charged with the commission of a particular crime, before he can be found guilty thereof, it is essential that the existence of the corpus delicti be established, *which cannot be done by mere extra judicial confession of the accused; it must be done by direct and positive proof about and beyond a reasonable doubt.* Facts ascertained by reason of the confession may be used for the purpose of establishing the corpus delicti; *but this will not dispose of the rule requiring that the corpus delicti must be proved independently of the confession, and beyond a reasonable* [fol. 38] *doubt. * * * before * * * evidence of the confession is admissible.*" (Relator's emphasis.)

In *Gaines* v. *State*, *supra*, the Indiana Supreme Court, speaking of the force attached to a confession not made in open court before the corpus delicti had been proved, said:

> "A naked confession is one which is not corroborated by independent proof of the corpus delicti. Upon such a confession made in open court, for example, by a plea of guilty, a conviction of any crime may be had. But in the case of all extra judicial confessions it is the rule that the corpus delicti must be proved by additional evidence *before a conviction upon the naked confession alone will be upheld.* Underhill on Criminal Evidence (2d Ed.), sec. 147."

See also: *Gillett on Indirect and Collateral Evidence, sec. 117:*

> "In the United States the doctrine is thoroughly established that an extra judicial confession will not be received as plenary evidence and further that there will also be required proof in such cases of the corpus delicti."

The Indiana Supreme Court recently followed the above principles of law in deciding the case of *Parker* v. *State*, *supra*, wherein the Court said:

> 'In Indiana the independent evidence alone need not be sufficient to establish the corpus delicti beyond a reasonable doubt, but there must be some evidence of probative value aside from the confession to prove that the crime charged was committed. When there is some independent evidence tending to prove that the crime charged has been committed by someone the confession may be considered with the independent [fol. 39] corroborating facts in determining whether the corpus delicti has been established beyond a reasonable doubt.
>
> "We are mindful of the rule that the extra judicial confession of the defendant is not alone sufficient to make out the corpus delicti.

"The extra judicial confession of the defendant alone is not sufficient to prove the corpus delicti; but such confession may be considered with independent corroborative facts, not of themselves sufficient to prove the corpus delicti beyond a reasonable doubt, to prove that the offense was committed.

"However, it seems established over the years that the corroboration required is not of incidental facts stated in the confession but that the offense charged has been committed. In Underhill's Criminal Evidence, 4th Ed., Section 36, p. 43, this subject is covered in the following language: 'The corroboration of a confession or admission which is required to prove the corpus delicti refers not merely to facts proving the confession but to facts concerning the corpus delicti, or evidence independent of the confession. The corroboration of a confession does not necessarily prove the corpus delicti.'"

Then, in the dissenting opinion written by Judge Bobbitt in the instant case, *Brown* v. *State*, *supra*, the following is shown:

"When considered with the other independent evidence in the record here, the evidence as recited in the majority opinion does not, in my opinion, furnish a state of facts sufficient to support a reasonable inference that someone robbed the victim herein as charged in the indictment.

"In my opinion there is not sufficient evidence here, independent of the extra judicial statements of appellant, from which a *proper* inference may be drawn, to show that Mildred Grigonis was killed by someone in the perpetration of robbery. For this reason the [fol. 40] verdict of the jury is contrary to law and the judgment should be reversed."

The Indiana Supreme Court also upheld the foregoing principle of law in another case:

"This court accepted the following rule that proof of the corpus delicti in a charge of homicide in the perpetration of a felony required proof both of the corpus delicti of the homicide but also the corpus delicti of the connected felony."

*Watts* v. *State*, 1950, 229 Ind. 80, 95 N.E. 2d 570.

Relator respectfully contends that the Trial Court herein arbitrarily failed and refused to follow the principles of law regarding the requirement that independent proof of the corpus delicti must be made * * * *before* * * * the admission of Relator's alleged confession; that the trial thereby became a sham and Relator was denied a fair and impartial trial, in violation of Relator's constitutional rights under the Fourteenth Amendment to the Constitution of the United States; that under the decision of the Indiana Supreme Court in this case: *Brown* v. *State, supra,* that Court also deprived Relator of due process and equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States, by affirming the judgment of the Trial Court and refusing to grant Relator a rehearing; that, under the facts and circumstances apparent to the Indiana Supreme Court and the laws applicable thereto, the finding ascribed to that Court in this cause could not have been made; and that this Court should issue the writ of habeas corpus prayed for herein, determine the facts and laws for itself, and restore Relator's constitutional rights.

15.

Relator further contends that his trial in this cause was conducted under such circumstances of fundamental un- [fol. 41] fairness as to deprive him of due process of law; that there was such basic unfairness in the trial as to substantially impair Relator's right to have due process of law under the Fourteenth Amendment to the Constitution of the United States, in the following particulars:

That the only offense for which Relator was lawfully on trial in this cause was the alleged murder and robbery of Mildred Grigonis; that Relator did not testify as a witness in his own behalf during said trial and his credibility was,

therefore, not in issue; that the trial court, however, permitted the State of Indiana to introduce testimony and evidence tending to show that Relator had also been guilty of numerous unrelated, independent, separate, and distinct offenses in no way connected with the crime charged; that the Trial Court denied Relator a fair and impartial trial by permitting the State of Indiana to introduce testimony and evidence tending to show that Relator had been guilty of:

(1) The rape-murder of one Lana Brock;

(2) The attempted rape of Betty Prince;

(3) The attempted rape of Ruth Frank;

(4) The attempted rape of Ann Pritchard;

(5) Numerous other rapes and rape attempts in 1957;

(6) Three attempted rapes in 1952;

(7) Numerous burglaries and larcenies;

(8) Being a former inmate of the Indiana Reformatory.

That the Trial Court, over Relator's timely objection, permitted the State of Indiana to introduce before the jury, the following testimony and evidence tending to show that Relator had committed the rape-murder of one Lana Brock:

> [fol. 42] "My name is Mrs. Charles O'Rourke, I am the mother of Lana Brock, she was 16 years old; the last time I saw here alive was the last Monday of September, 1956; she left home that day shortly before noon; she had on dark blue peggies, which are tight pants, a short, white-check blouse, she had her hair in pin curls, had a scarf on and she had on white shoes." (See R. 272)

The next witness, Mr. Charles Nelson, Deputy Sheriff:

> "On October 2, 1956, I took the photograph of the location and the body, as it was located, of *Lana Brock* where it was found in a sand pit north of the Old Hobart Airport, in the New Chicago and Hobart area

of Lake County; and State's Exhibit 31 shows the girl's right leg sticking out of the sand; No. 32 shows the deputies uncovering the body; No. 33 shows the body after it was uncovered; No. 34 shows the scene and the body; No. 35 is a close-up view of the body; No. 36 is a picture of *Lana Brock* taken in the morgue in Gary."

The next State witness, *Nick Garapich*, on direct examination (R. 173), testified as follows:

"My name is Nick Garapich, I am a deputy sheriff of Lake County, working as partner with Eli Uzelac; my testimony would be about the same as his; On May 1, 1957, defendant was questioned about the *murder of Lana Brock;* first he denied knowing anything about it; later he said he had attacked her and raped her and choked her until she stopped breathing and then he used a shovel to cover her with sand; this was about a mile or a mile and one-half from where Mildred Grigonis was found; he gave us a signed statement about it."

On direct examination, *Sandor Singer*, as a State witness, testified to the following:

[fol. 43] "My name is Sandor Singer, I am Chief Deputy Sheriff, Criminal Division, Lake County, my testimony would be about the same as that of Deputy Uzelac; the defendant went with us in a car and showed us where the Grigonis car was parked, where he picked up the woman, directed us along the route he took to where the body was found; and showed us how he choked her; in the same way he showed us about Lana Brock crime; State's Exhibit 16 is the signed statement defendant made on April 29, 1957, and State's Exhibit 17 is a signed statement defendant made on May 1, 1957."

That the Trial Court, over Relator's objection, permitted the State of Indiana to introduce before the jury the testi-

mony of *Betty Prince*, on direct examination, (R. 94), which shows the following:

> "My name is Betty Prince, I live at 2951 Hampton Court, East Gary, Indiana, with my parents; I am 19 years old; on February 28th of this year I was a waitress at Goldblatts in Gary; I took the bus to go home about 9:20 and got off the bus in East Gary about twenty-five minutes to ten, at the bridge on Central Avenue in an unoccupied area; I have two brothers, 15 and 12, who usually meet me so I won't have to walk home alone; I live seven or eight blocks from the bus stop; part of the way is only a trail; when I got off the bus a car pulled up behind me; it was dark; my brothers had not come yet; after going about half a block someone grabbed me from behind and put his hand over my mouth and threw me to the ground; he started choking me; I screamed; I told him he wouldn't need to choke me, that I wouldn't scream; he started putting his hands under my clothes and I screamed again and he started hitting me; he tore my panties; I heard my brothers coming; I screamed; they started running toward me and he jumped up, took my purse and ran off; I scratched his face; he got in a car; I could not see his face; in [fol. 44] April or May the Sheriff brought the defendant to where I was working; he had scars on his face as if from scratches; he is of about the same size as, and his voice is similar to that of the man who attacked me."

*Betty Prince*, on cross-examination, testified as follows:

> "It was two and a half or three months when the Sheriff brought the man to me; the scars looked like finger nail scratches, away across his face." (R. 100)

That the Trial Court, over Relator's objection, permitted the State of Indiana to introduce before the jury the testimony of *Ruth Frank*, on direct examination, (R. 102), who said:

"My name is *Ruth Frank*, I live at 7320 Independence Court, Crown Point; that is Independence Hill, off Route #55, about 4 miles north of Crown Point; I live with my parents; I am 21; on March 7 of this year I was coming home from shopping in Gary and got off the bus about 10:10 in the evening; while walking toward home a car came up, a man got out and grabbed me from behind; I screamed and he put his hand over my mouth, knocked me down, took my purse and ran; I could not see his face."

That the Trial Court, over Relator's objection, permitted the State of Indiana to introduce before the jury the testimony of *Ann Pritchard*, on direct examination, who testified as follows:

"My name is Ann Pritchard; I live at 11 North Lake Street, Michigan City; I am 18 years old; I have a 7 months old baby; on February 22, 1957, I was living in the Miller area of Gary and was attacked by a man; I was walking home at night and a man grabbed me and dragged me into a gully; I kicked and screamed and he ran away; when I saw the defendant's picture in the paper I identified him as the same man." (R. 112)

[fol. 45] The Trial Court, by stipulation, but without Relator's consent or knowledge, permitted the State of Indiana to introduce a photostatic copy of a certified copy of commitment from the Circuit Court of Jefferson County, dated January 7, 1949, committing George Robert Brown, age 16, to the Indiana Reformatory on conviction of a charge of "Assault and Battery with Intent to Rape."

The Trial Court, over Relator's objection, permitted the State of Indiana to introduce into evidence and read before the jury State's Exhibit 28, (R. 218), purportedly being a signed statement given by Relator to the Lake County Sheriff on May 4, 1957, which alleged statement admitted numerous rapes and attempted rapes by Relator.

The Trial Court, over Relator's objection, permitted the State of Indiana to introduce into evidence and read before

the jury State's Exhibit 26, (R. 209), purportedly being a signed statement given by Relator to Gary, Indiana, police officers in 1952, and admitting three (3) attempted rapes.

The Trial Court, over Relator's objection, permitted the State of Indiana to introduce into evidence and read to the jury State's Exhibit 27, (R. 218), purportedly being a signed statement given by Relator to Lake County Sheriff on November 8, 1956, and admitting numerous burglaries and larcenies.

Relator's complaint regarding the introduction during the trial of this cause before the jury therein of the foregoing testimony and evidence regarding a great many unrelated, independent, separate, and distinct offenses in no way connected with the offense actually charged therein is not one of a mere error but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void for want of the essential elements of due process; that the [fol. 46] procedure followed by the trial court in this case offends a principle of justice so deeply rooted in the traditions and conscience of our people as to make the trial a sham; that in this case Relator was on trial only for the alleged murder and robbery of Mildred Grigonis; but the trial court proceeded to try Relator for numerous other unsolved crimes not then at issue; that the Trial Court thereby denied Relator a fair trial, and that the Trial Court well knew that the State of Indiana introduced all of said evidence and testimony for the sole purpose of influencing and prejudicing the jury against Relator; that the general rule of law in effect in Indiana is that one crime cannot be proved to show guilt in another, *State* v. *Robbins*, 1943, —— Ind. ——, 46 N.E. 2d 691, 695; *Smith* v. *State*, 1939, —— Ind. ——, 21 N.E. 2d 709; *Gears* v. *State*, 1933, —— Ind. ——, 185 N.E. 131; the law will not permit the State to depart from the issue and introduce evidence of other extraneous offenses of misconduct that have no natural connection with the pending charge, and which are calculated to prejudice the accused in his defense, *Hankins* v. *State*, 1916, —— Ind. ——, 113 N.E. 2d 232, 233; *Porter* v. *State*, 173 Ind. 694, 703, 91 N.E. 340; *Dunn* v. *State*, 162 Ind. 174, 70 N.E. 521; that the proof of other crimes or

occurrences of similar nature is only permissible in the trial of a criminal charge in those cases where the act constituting the crime under investigation has been clearly established and the motive, intent, or guilty knowledge is in issue, *Kahn* v. *State*, 1914, 182 Ind. 1, 105 N.E. 385, and where the possibility of improper evidence has been interposed, it will be presumed to be harmful, unless the contrary is made to appear, *Rock* v. *State*, 1915, —— Ind. ——, 110 N.E. 212; *Underhill* v. *State*, 1916, —— Ind. ——, 114 N.E. 88, 90; that the State of Indiana introduced said testimony and evidence pertaining to other crimes to establish the corpus delicti; that evidence of these other crimes is not [fol. 47] admissible to prove the corpus delicti; *Parker* v. *State, supra; Kahn* v. *State, supra;* and that it was not proper under the facts in this case to allow the State of Indiana to offer testimony and evidence before the court and jury tending to prove that Relator had a criminal record; *Vaughn* v. *State*, 1939, —— Ind. ——, 19 N.E. 2d 241; that the decision of the Indiana Supreme Court in affirming the appeal made in this case actually amounted to a complete denial to Relator of due process and equal protection of the law under the facts and circumstances herein, all in contravention of the Fourteenth Amendment to the Constitution of the United States, and that said judgment in this case should not be allowed to stand.

16.

Relator further avers that the judgment and sentence in this cause and Relator's imprisonment and pending execution thereunder have become repugnant to and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, in all of the following circumstances:

(a)

That throughout the existence of this cause Relator has been an absolute pauper, without funds or means to employ an attorney to represent him and unable to pay filing fees or the cost of preparing records and transcripts necessary to present his cause to the proper courts; that Relator has

been and now is without the requisite skill and knowledge to properly present his complaint to the courts, in that he is an uneducated layman untrained in the law and intricacies of procedure to properly represent himself and secure redress without the assistance of counsel.

[fol. 48] (b)

That following this Court's action in denying Relator's prior petition for writ of habeas corpus, Relator promptly contacted Mr. Robert S. Baker, Indiana's Public Defender, and requested that office to represent Relator in presenting his cause to the proper State courts; that the office of Public Defender and the duties of same were created and defined by *Burns' Indiana Statutes*, sections 13-1401 and 13-1402, which provide, respectively:

> "There is hereby created the office of Public Defender, * * * ."
>
> "It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

that, in response to Relator's request for assistance from the Public Defender, he received the following letter:

> "We are in receipt of your interview form, the habeas corpus and order in the federal court. We will assist you in a coram nobis filed in the Lake Criminal Court, although at this time we know of no error in your trial so you may exhaust your state remedies. Please write and file your own coram nobis, send us a copy, and we will enter our appearance for you, and get it set for a hearing."

(c)

That Relator then employed the services of another inmate of the Indiana State Prison (who was not a lawyer but who was better acquainted with the law than Relator),

to prepare a petition for a writ of error coram nobis in Relator's behalf; that said petition was filed in the Trial [fol. 49] Court on or about the 10th day of May, 1960, and presented, as grounds therefor, the following:

(1) Inadequate representation by Court-appointed counsel at his trial in Lake County, Indiana Criminal Court.

(2) Procurement by State authorities of a confession from petitioner (Relator herein) through fear produced by threats and prolonged questioning during an illegal detention.

(3) Admission of confession before proof of the corpus delicti.

(4) Admission into evidence of exhibits and testimony of petitioner's prior commitment to a mental institution and crimes of rape and attempted rape alleged to have been committed by the petitioner.

that a hearing was had in the Trial Court on said petition on the 1st day of June, 1960, at which time the Public Defender appeared in behalf of Relator and represented Relator throughout said hearing; and that on the same date said petition was overruled and Relator was denied relief.

(d)

That Relator then requested the Public Defender to represent him in perfecting an appeal to the Indiana Supreme Court from the order of the Trial Court overruling and denying his coram nobis petition, but said Public Defender refused to do so in the following letter to Relator:

"After a careful review of your hearing had on June 1 on your petition for Writ of Error Coram Nobis in the Criminal Court of Lake County, will advise that I am unable to find any error or errors that would have any merit to assign upon an appeal; therefore, I am hereby informing you that my office will not appeal the judg- [fol. 50] ment denying your Petition for Writ of Error Coram Nobis.

"I have talked to the Chief Deputy Attorney General and he informed me that in the event my office refuses to perfect an appeal for you and if you are a pauper, and allege these facts in any petition you file in the Federal Court, the Attorney General will concede that you have exhausted your state remedies. I have no authority to appear for you in the Federal Court but I believe the Federal Judge might appoint counsel for you.

"Due to the above facts, I am closing my file on your case.

"Yours truly,

"Robert S. Baker
"Public Defender of Indiana."

(e)

That thereafter, with the assistance of the aforementioned inmate, Relator filed a timely Notice of Appeal with the Clerk of the Trial Court and also filed a Motion to Appoint Counsel and Furnish Transcript of Record on the same day, wherein Relator alleged that he desired to appeal to the Indiana Supreme Court from the Trial Court's order overruling his coram nobis petition, that he was without funds to employ counsel to represent him and could not pay the cost of the transcript necessary for such appeal, and that the Public Defender had refused to assist him in perfecting said appeal; that thereafter, on the 14th day of July, 1960, the Trial Court overruled said motion, in the following Order:

"It is therefore considered, adjudged and decreed by the Court that the Motion to Appoint Counsel and Furnish Transcript of Record of the Error Coram Nobis proceedings, filed herein on the 29th day of [fol. 51] June, 1960, be and the same is hereby overruled and denied."

(f)

That thereafter, Relator filed his Verified Petition for Writ of Mandate in the Supreme Court of Indiana, wherein

he alleged that the Trial Court's refusal to appoint counsel and furnish Relator with a transcript at State expense prevented him from appealing the denial of his coram nobis petition and amounted to an unconstitutional discrimination against Relator, and wherein Relator prayed the Supreme Court to order the Trial Court to appoint counsel and furnish such transcript to Relator; and that, on the 2nd day of February, 1961, the Indiana Supreme Court denied the Relator's Verified Petition for Writ of Mandate in an opinion reported as *Brown* v. *State*, No. O-604, 1961, —— Ind. ——, 171 N. E. 2d 285.

(g)

That Relator thereafter, on or about the 28th day of March, 1961, and again with the assistance of another inmate of the State Prison, filed his Petition for Writ of Certiorari in the Supreme Court of the United States, wherein he prayed the Court to review the opinion of the Indiana Supreme Court denying Relator's petition for writ of mandate, and which petition for writ of certiorari was docketed in the United States Supreme Court as *Brown* v. *Indiana*, *No. 953 Miscellaneous, October Term, 1960*; that on the 12th day of June, 1961, said Court denied the application for writ of certiorari in said cause and entered the following Order:

> "Petition for writ of certiorari to the Supreme Court of Indiana denied without prejudice to an application [fol. 52] for a writ of habeas corpus in the appropriate United States District Court, it appearing from the papers submitted that the State is prepared to concede that petitioner has exhausted state remedies. Mr. Justice Douglas would grant the petition for certiorari and reverse the judgment below on the authority of *Smith* v. *Bennett*, 365 U. S. 708."

(h)

Relator would respectfully submit that the action of the Indiana Public Defender in refusing to obtain a transcript of the coram nobis hearing and assist Relator in perfecting

an appeal to the Indiana Supreme Court from the denial of his coram nobis petition, the action of the Trial Court in overruling Relator's Motion to Appoint Counsel and Furnish Transcript of Record, and the action of the Indiana Supreme Court in denying Relator's Verified Petition for Writ of Mandate effectively and unlawfully denied to Relator the substantial right to perfect an appeal to the Indiana Supreme Court in the coram nobis proceedings had herein; that *Rule 2-40 of the Rules of the Indiana Supreme Court* affords the right to review by the Supreme Court of Indiana to all persons within Indiana's jurisdiction, and provides, in part:

> "An appeal may be taken to the Supreme Court from an order granting or denying a petition for writ of error coram nobis. * * * The transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the Clerk of the Supreme Court within ninety (90) days after the date of the order. * * * *."

that such review for error is a *matter of right* and cannot be arbitrarily denied by the State of Indiana and cannot be made to depend upon a preliminary showing of error; that, without the assistance of counsel, Relator has diligently [fol. 53] sought to adequately present his grievances to the Trial Court by his verified petition for writ of error coram nobis; that said petition was legally sufficient to show the Trial Court the identical Federal questions averred in the instant petition; that the Public Defender of Indiana refused to prepare or file any pleadings at all in behalf of this Relator and consented only to appear in the Trial Court, provided Relator himself prepared the pleadings therein; that the Public Defender did appear in the Trial Court during the hearing on the merits of said petition for writ of error coram nobis; that, after the hearing, the Trial Court denied said petition and the Public Defender abandoned Relator and refused to perfect an appeal therein to the Indiana Supreme Court; that the Public Defender arbitrarily "decided" there was no merit to said appeal; that even the five (5) judges of the Indiana Supreme Court

are wholly unable to decide whether there is any merit in any appeal made to that Court until after said appeal is fully presented, briefed, and argued to the full court; that, in this case, no judicial decision by appeal from the denial of said petition for writ of error coram nobis is available in the Indiana Supreme Court because the Public Defender of Indiana "decided" there was no merit to such an appeal; that the Indiana Supreme Court, speaking on this point, said:

> "We therefore conclude that if, as it appears in this case, a belated proceeding in error coram nobis has been had and adjudged against a convicted defendant, and the Public Defender, who is a former jurist and an eminently qualified trial lawyer, has made a careful review of the proceedings on behalf of such defendant, and has determined that he is 'unable to find any error or errors that would have any merit to assign upon an appeal,' so adjudges and advises the convicted defendant, the state has thereby afforded to [fol. 54] the defendant every reasonable guarantee of due process, as contemplated by the Constitution of the United States and of the State of Indiana."

that Relator respectfully urges that the Public Defender is neither a member or a judge of the Indiana Supreme Court but that, for all practical purposes in this case, the Indiana Supreme Court has cloaked said Public Defender with the full appellate authority of the Indiana Supreme Court and the judicial power and authority to "decide" that an appeal in this case from the denial of the coram nobis petition would be without merit and, therefore, would be denied by the Indiana Supreme Court; that the authority to determine error in lower state court proceedings has exclusive repose in the majority rule of the five (5) judges of the Indiana Supreme Court and cannot be delegated to a "Commissioner," a "Public Defender," or another form of "screening process"; that prior decisions of the Indiana Supreme Court are in conflict with this decision in this case, as shown by the following:

"Provisions for reviewing exceptions, and for review of decisions and orders of the court, made in the progress of criminal trials, is found in the Criminal Code. By its provisions a review may be had by an appeal to this Court. This, no other having been provided, must be deemed to be exclusive of all other means for obtaining a review in a criminal case."

*Frazier* v. *State*, 1886, 106 Ind. 562, 7 N. E. 379.

See Also:

"But it is difficult to see how it can be determined that a judgment is erroneous when there has been no appeal to the only tribunal that has jurisdiction to determine whether there was error."

*Kunkle, Warden* v. *Moneyhon*, 1938, 219 Ind. 606.

[fol. 55] that the decisions of the Federal courts are in complete agreement with the two foregoing decisions of the Indiana Supreme Court:

"The Indiana State Constitution guarantees the right to appeal in all cases. Warren v. Indiana Telephone Company, 217 Ind. 93, 26 N. E. 2d 399. A convicted defendant in a criminal case in Indiana may have his case reviewed regardless of the chance for reversal. State ex rel. White v. Hilgeman, 218 Ind. 572, 34 N. E. 2d 129; State v. Spencer, 219 Ind. 148, 41 N. E. 2d 601."

*U. S. ex rel. Cook* v. *Dowd*, 1950, 180 F. 2d 212.

in *Orfield, Criminal Appeals in America, 1939*, the question presented herein is discussed, and, at page 49, it is said:

"A much less extreme form of appeal would be as of right whenever the defendant takes the initiative in asking for it. In its broadest form this right would involve review irrespective of the opinion of the trial court or the appellate court as to the need therefor, review with respect to all crimes, serious or slight, review whether the errors were substantial or trivial

or even non-existent and whether they were of law or fact, and review on the whole record with a hearing in the appellate court. State constitutions frequently guarantee a right of this scope." (Note 1)

*NOTE 1:* "Where this is true, discretionary jurisdiction could not be substituted by statute, as it could be in civil cases where the constitution merely provides that the Supreme Court shall have the power of review. Schweppe, Possible Methods of Relieving the Supreme Court of the State of Washington (1929) 4 Wash. L. Rev. 1, 8."

and at page 51:

"Appeal by judicial permission is the last form for consideration. In those states where constitutions give [fol. 56] the accused a right of appeal this method could only be *introduced by constitutional amendment.*". (Relator's emphasis)

and, again, at page 291:

"Appeal of right results in the possibility of frivolous appeals since objections cannot be said to be frivolous until the appellate court has considered them."

Relator further submits that the decision of the Indiana Supreme Court on Relator's Verified Petition for Writ of Mandate is in diametric opposition to the decision of the Supreme Court of the United States in the case of *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, —— U. S. ——, (No. 96. —October Term, 1957, decided June 16, 1958), wherein the United States Supreme Court held:

"In *Griffin* v. *Illinois*, 351 U. S. 12, we held that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. We hold that Washington has denied this constitutional

> right here. *The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript.* We do not hold that a State must furnish a transcript in every case involving an indigent defendant. But here, as in the *Griffin* case, we do hold that, '(d)estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.'" (Relator's emphasis)

[fol. 57] Relator recognizes that the State, when required to bear the cost of appellate process, may take steps to protect itself "so that frivolous appeals are not subsidized and public moneys not needlessly spent" (See: concurring opinion of Justice Frankfurter in the *Griffin* case, *supra*); however, Relator urges that such steps employed by the State must not be repugnant to the constitutional concept of Due Process and Equal Protection; that the process employed by Indiana in this particular case *is* repugnant and offensive to the Fourteenth Amendment, in that a review by the Public Defender cannot be tantamount to or afford the same protection to an appellant, and is not "an adequate substitute for the right to full appellate review available to all defendants in (Indiana) who can afford the expense of a transcript"; that those persons who can afford a transcript are accorded a review by the five (5) judges of the Indiana Supreme Court, while the pauper's case is reviewed by the Indiana Public Defender, who is apparently empowered with the full authority of the majority of the judges of the Indiana Supreme Court; that, after the Public Defender refused to assist Relator in appealing the coram nobis ruling to the Indiana Supreme Court, Relator thereafter requested the Trial Court to appoint counsel and to furnish the transcript at public expense in order that Relator might perfect his appeal to the Indiana Supreme Court; that the Trial Court refused to appoint counsel and refused to furnish a copy of said transcript, which was a prerequisite to the perfection of said appeal; that Relator

then requested the Indiana Supreme Court to issue a writ of mandate compelling the Trial Court to appoint counsel and furnish such transcript, but said request was denied by the Supreme Court on the 2nd day of February, 1961; that Relator could not appeal without counsel and without a transcript of the proceedings; that Relator's right to [fol. 58] appeal in the coram nobis proceedings was made to depend solely upon the question of whether he could afford to purchase a transcript of the proceedings; that all other persons within Indiana's jurisdiction, and who have sufficient funds to purchase the necessary transcript, are afforded an appeal to the Indiana Supreme Court in coram nobis proceedings *as a matter of right*, and such right is not predicated upon a preliminary showing of error, nor is any "screening process" employed by the State to determine whether such appeal shall be allowed; that the Trial Court and the Indiana Supreme Court unconstitutionally took away Relator's right to have an appellate review of his error coram nobis petition when said courts refused to afford Relator counsel and a copy of the transcript necessary to the preparation and perfection of an appeal to the Supreme Court; that said courts thereby refused to follow the principles of law enunciated by the Supreme Court of the United States in the leading and controlling cases of *Griffin* v. *Illinois* (1956), 351 U. S. 12, 24, 76 S. Ct. 585, 593, 100 L. Ed. 891; *McCrary* v. *Indiana* (1960), 364 U. S. 277; *Burns* v. *Ohio* (1959), 360 U. S. 252, 256; *Eskridge* v. *Washington State Board*, *supra*; and *Smith* v. *Bennett* (1961), 365 U. S. 708. In the case of *Smith* v. *Bennett*, *supra*, the United States Supreme Court held:

> "We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.
>
> • • •
>
> "The gist of these cases (*Burns* v. *Ohio*, *supra*; *Griffin* v. *Illinois*, *supra*) is that because 'there is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants,' *Burns* v. *Ohio*, *supra*, at 257-258,

[fol. 59] 'there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.' *Griffin* v. *Illinois, supra*, at 19, and consequently that 'the imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.'"

that the action of the State of Indiana in this particular was offensive to a civilized sense of justice and repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and rendered Relator's conviction and pending execution in this cause in violation of said Fourteenth Amendment; that this Honorable Court should, therefore, issue the Writ of Habeas Corpus and restore Relator's constitutional rights in this cause.

17.

Relator would further aver that he has exhausted all remedies afforded in the state courts of Indiana for redress of the grievance presented in the preceding paragraph (No. 16, a to h), in that, following the action of the Public Defender in refusing to assist Relator in perfecting his appeal from the coram nobis hearing, the Relator applied to the Trial Court for appointment of counsel and a copy of the coram nobis transcript, which application was legally sufficient and complied with all procedural rules necessary for the relief therein prayed, and which application was determined by the Trial Court on its merits and thereafter denied; that said application specifically called the Trial Court's attention to the prior rulings of the United States Supreme Court in cases involving the denial of a transcript to a pauper defendant and its effect under the Fourteenth [fol. 60] Amendment; that, following the denial of said application, Relator filed a timely Notice of Appeal and, within the ninety (90) days provided by Rule 2-40, Supreme Court Rules, filed his Verified Petition for Writ of Mandate wherein he presented the identical question to the Indiana Supreme Court; that said petition was legally

sufficient to properly present said question and complied with all procedural rules necessary for the relief therein prayed; that said petition was heard on its merits by the Supreme Court, and determined adversely to Relator's interests; that said petition specifically called the court's attention to the denial of Relator's constitutional right to perfect his appeal and the prior decisions of the United States Supreme Court on the subject of denial of a transcript to a pauper defendant and its effect under the Fourteenth Amendment; that Relator thereafter filed a timely Verified Petition for Writ of Certiorari in the Supreme Court of the United States, wherein Relator presented the identical question involved herein, and that Court, on the 12th day of June, 1961, entered the following Order in this cause:

> "Petition for Writ of Certiorari to the Supreme Court of Indiana denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court, it appearing from the papers submitted that the State is prepared to concede that petitioner has exhausted state remedies. Mr. Justice Douglas would grant the petition for certiorari and reverse the judgment below on the authority of *Smith* v. *Bennett*, 365 U. S. 708."

18.

That your Relator is now confined in the Indiana State Prison, under sentence of death, solely by virtue of the judgment and sentence of the Lake County Criminal Court; [fol. 61] that said judgment and sentence are wholly void and really imply no judgment or sentence at all; that, where constitutional rights were denied in the course of a criminal trial, as was done in this case, or where the State subsequently unlawfully denies to the defendant due process of law and equal protection of the laws, as was likewise done in this case, such denial renders the judgment and sentence absolutely void; that once a judgment becomes void, it remains void forever; that under the facts and circumstances of this case, as disclosed in this petition, it

is most respectfully submitted that the judgment and sentence of death in this case is absolutely void and that this Court should, therefore, issue the great writ of habeas corpus and enforce, protect, and restore Relator's Federally protected constitutional right to have due process and Equal protection of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

19.

Relator further avers that he has served a true and complete copy of this petition, together with a copy of all ancillary motions attached thereto, upon the Attorney General of Indiana, attorney for the Respondent herein, by mailing such copy to said attorney by United States Mail, with postage prepaid, and that Relator has also served such copy to the Respondent, Ward Lane.

20.

Wherefore, Relator respectfully prays that a Writ of Habeas Corpus issue forthwith, directed to the Respondent, Ward Lane, as Warden of the Indiana State Prison, commanding him to produce the body of Relator, George Robert Brown, before this Honorable Court at a time to be therein [fol. 62] specified, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this Court then and there summarily proceed to determine the facts and legality of Relator's imprisonment and pending execution by Respondent, and then and there discharge Relator without day, or otherwise dispose of Relator as the facts, the Law and justice shall require.

Respectfully submitted,

George Robert Brown, #29748, Box 41, Indiana State Prison, Michigan City, Indiana, Relator, Pro se.

State of Indiana,
County of LaPorte, ss.:

Verification

George Robert Brown, having been first duly sworn according to law, upon his oath deposes and says:

That I am the same George Robert Brown who is the Relator in the foregoing Verified Petition for a Writ of Habeas Corpus that I have read and examined the said petition, and that the matters and facts therein alleged are true, and I so swear.

George Robert Brown, Relator-Affiant.

[fol. 63] Subscribed and sworn to before me, the Undersigned Notary Public, this 18th day of July, 1961.

Edwin A. Gabel, Notary Public, LaPorte County, State of Indiana.

(seal)

My Commission Expires: 4-10-65

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[fol. 64]

In the United States District Court

Northern District of Indiana

[Title omitted]

To: The Honorable Robert A. Grant, Presiding Judge of the United States District Court for the Northern District of Indiana, South Bend Division.

Verified Petition for a Stay of Execution—
Filed July 20, 1961

Comes now George Robert Brown, the Relator in the Verified Petition for a Writ of Habeas Corpus herewith submitted, and respectfully moves this Honorable Court

to issue an Order staying Relator's scheduled execution by Respondent, in all of the following, to-wit:

1.

That Relator herewith submits his Verified Petition for a Writ of Habeas Corpus; that Relator verily believes he is entitled to the redress sought therein and said petition is neither frivolous nor malicious but presents grave and meritorious questions of Relator's detention and pending [fol. 65] execution by Respondent in flagrant violation of the "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment to the Constitution of the United States of America, as is more fully set forth in the petition for the writ.

2.

That Relator has exhausted all remedies available to him in the courts of Indiana for redress of the grievances presented in the petition, as required by 28 U.S.C.A., Section 2254, as is more fully set forth in the petition for the writ, and this Court therefore has jurisdiction to entertain the petition and Order a stay of execution herein.

3.

That, pursuant to the judgment of conviction heretofore rendered against Relator in the Lake Criminal Court, of which judgment Relator complains in the petition for the writ, the Honorable John H. McKenna, Judge of said Court, has ordered the Respondent herein to execute Relator before the hour of sunrise on August 1, 1961; that, unless the instant petition be granted and this Honorable Court Order a stay of said execution, the Respondent will carry out said death sentence on August 1, 1961, and the Relator will be executed.

4.

That this Honorable Court has exclusive jurisdiction and authority under the facts and circumstances disclosed in the petition for the writ to hear and determine the ques-

tions raised therein and to Order a stay of execution in this cause pending the determination and disposition of the petition; that Relator has no action pending in any other court or before any other authority which would [fol. 66] cause a stay of said execution beyond the date of August 1, 1961, as set therefor by the Lake Criminal Court.

5.

That there is not sufficient time remaining between the present date and the aforesaid date set for Relator's execution for a full determination of the questions presented to this Honorable Court in the said Verified Petition for a Writ of Habeas Corpus.

Wherefore, for each and all of the foregoing reasons, the Relator respectfully moves the Court to issue an Order staying the Relator's scheduled execution from August 1, 1961, until such time as will allow for a full determination of the questions presented in the aforesaid Verified Petition for a Writ of Habeas Corpus, and that the Respondent be notified of such Order.

Respectfully submitted,

George Robert Brown, Relator.

State of Indiana.
County of LaPorte, ss.:

Verification

George Robert Brown, having been first duly sworn according to law, upon his oath deposes and says:

That I am the same George Robert Brown who is the Relator in the foregoing Verified Petition for a Stay of Execution and the Verified Petition for a Writ of Habeas Corpus submitted therewith, that I have read and examined [fol. 67] the said foregoing petition, and that the matters and facts therein alleged are true, and I so swear.

George Robert Brown, Relator Affiant.

Subscribed and sworn to before me, the undersigned Notary Public, this 18th day of July, 1961.

Edwin A. Gabel, Notary Public, County of LaPorte, State of Indiana.

(seal)

My Commission Expires: 4-10-65.

[fol. 68] And now the petitioner requests leave to amend petition, which request is granted by the court, and the amended petition is filed and reads in the words and figures following, to wit:

[File endorsement omitted]

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

[Title omitted]

MOTION TO AMEND RELATOR'S VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS—Filed July 26, 1961

Comes now the Relator, George Robert Brown, in person and by his attorneys, George N. Beamer, Nathan Levy, and Joseph T. Helling, and moves the court for leave to amend relator's verified petition for a writ of habeas corpus as follows:

1. By adding to paragraph 1 of said petition, subparagraph lettered k, which proposed amendment reads as follows: "Relator having thus exhausted all of his remedies under the laws of the State of Indiana to raise any of the questions earlier presented, now petitions this Honorable Court for a writ of habeas corpus on the following grounds:

[fol. 69]

(1) Inadequate representation by court-appointed counsel at his trial in Lake County, Indiana Criminal Court.

(2) Procurement by State authorities of a confession from petitioner through fear produced by threats and prolonged questioning during an illegal detention.

(3) Admission of confession before proof of the corpus delicti.

(4) Admission into evidence of exhibits and testimony of petitioner's prior commitment to a mental institution and crimes of rape and attempted rape alleged to have been committed by the petitioner.

(5) That Relator has been denied equal protection of the law in that he was effectively denied an appeal from the Order of the Lake County, Indiana Criminal Court, denying his petition for writ of error coram nobis because of his poverty and inability to secure a transcript, which right of appeal is available to all defendants in Indiana who can afford the expense of a transcript.

George Robert Brown

George N. Beamer, Nathan Levy, Joseph T. Helling, Attorneys for Relator.

[fol. 79] State of Indiana,
St. Joseph County, ss.:

George Robert Brown, being first duly sworn says that he is the Relator in the foregoing motion to amend the verified petition for a writ of habeas corpus hereinbefore filed; that the matters set forth in said motion to amend are true.

George Robert Brown

Subscribed and sworn to before me this 26th day of July, 1961.

Joseph T. Helling, Notary Public.

My commission expires: Feb. 24, 1962.

[fol. 71] Statement of counsel made (Nathan Levy) for petitioner, statement of counsel for respondent made (Johnson). State is granted 90 days within which to act, order to be entered, at close of time respondent will be directed to appear pending disposition of these, stay of execution granted, pending final outcome of proceedings remaining portion of petition of habeas corpus continued until state concludes action, whereupon an order and opinion was entered, which order and opinion reads in the words and figures following, to wit:

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

Civil No. 2904

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UNITED STATES OF AMERICA ex rel. GEORGE ROBERT BROWN, Petitioner,

vs.

WARD LANE, Warden Indiana State Prison, Respondent.

---

ORDER—Entered July 26, 1961

This is a petition for a Writ of Habeas Corpus filed by petitioner on July 20, 1961. Petitioner is presently under sentence of death imposed by the Lake County, Indiana, Criminal Court upon a conviction for murder in the perpetration of robbery.

The issue in this petition is whether the State of Indiana denied petitioner "equal protection" as guaranteed by the [fol. 72] 14th Amendment to the Constitution of the United States by its action in allowing the Public Defender sole discretion in determining whether or not he will represent this pauper-petitioner and furnish him with the required transcript in order that an appeal might be perfected from a denial of a Petition for Writ of Error Coram Nobis.

The facts relevant to a determination of this issue, briefly stated, are as follows:

On May 10, 1960, the petitioner filed in the Lake County, Indiana, Criminal Court a Verified Petition for Writ of Error Coram Nobis. A hearing was had on this petition on June 1, 1960, at which time the Trial Court denied the same. Thereafter the petitioner asked the Public Defender to represent him to perfect an appeal from this denial to the Indiana Supreme Court. The Public Defender declined to assist Petitioner and furnish him with a transcript.

The Petitioner then filed, in the Lake County Criminal Court, a Motion to appoint counsel and furnish transcript of record, but this Motion was denied.

Petitioner then filed a Verified Petition for a Writ of Mandate, asking the Indiana Supreme Court to direct the Lake County Criminal Court to appoint counsel and furnish a certified copy of the lower court's record and transcript of the Coram Nobis hearing in order that he could appeal to the Indiana Supreme Court from the order overruling and denying his Coram Nobis Petition.

The Supreme Court of Indiana, on February 2, 1961 denied this petition. *Brown* v. *State* (1961), —— Ind. ——, 171 N. E. 2d 825.

On March 27, 1961, the petitioner filed a petition for Writ of Certiorari in the Supreme Court of the United States. This Writ was denied on June 12, 1961.

[fol. 73] Petitioner then filed the present Petition for Writ of Habeas Corpus in this Court.

The Indiana Public Defender Act, Burns' Indiana Statutes Annotated, § 13-1402, states that:

> "(I)t shall be the duty of the public defender to represent any person in any penal institution in this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

In *State ex rel. Casey* v. *Murray* (1952), 231 Ind. 74, 106 N. E. 2d 911, the Supreme Court of Indiana said that "since the State had created the office of Public Defender to represent pauper prisoners after the regular time for appeal had expired, the prisoner is not entitled to a tran-

script of the record or the services of other counsel at public expense, but his record, at public expense, must be obtained through the Public Defender as prescribed by statute."

In interpreting the Indiana Public Defender Act, the Supreme Court of Indiana pointed out in the case of *Jackson* v. *State* (1960), —— Ind. ——, 169 N. E. 2d 128, that this statute gives a defendant who desires an attorney to represent him in a post-conviction remedy and who is without funds to procure such an attorney, the right to proceed to obtain the services of the Public Defender. However, in *State ex rel. Casey* v. *Murray*, supra, at page 912, the Supreme Court of Indiana held that "the Public Defender is not required to represent any prisoner whose assertion that he is unlawfully imprisoned, after due investigation, appears in his sound judgment to have no merit."

[fol. 74] The effect of these decisions denies some indigent defendants appellate review from an order dismissing a petition for a Writ of Error Coram Nobis. A defendant who can afford to pay for a transcript can perfect an appeal, either pro se or through counsel, but an indigent defendant, in order to perfect an appeal, must first seek the aid of the Public Defender who has discretion to determine whether the case has merit before he decides to represent the defendant. If the Public Defender determines that the case has merit he can obtain the transcript; however, if he decides that the case is without merit, the defendant is unable to obtain a transcript. Therefore, an indigent defendant who is unable to convince the Public Defender that his case has merit is denied appellate review because the Supreme Court Rule 2-40 requires that a "transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the Clerk of the Supreme Court. . . . " Indiana Sup. Ct. 1958 Edition Rule 2-40.

As applied to the facts of this case, the effect of the decisions produces a result that is in disharmony with the "equal protection" clause of the 14th Amendment. Petitioner attempted to secure the services of the Public Defender to represent him to perfect an appeal from the denial of his petition for Writ of Error Coram Nobis but the

Public Defender declined to assist him. Petitioner thereupon asked the Lake County Criminal Court to appoint counsel and furnish a transcript of the record, but this was denied. The Supreme Court of Indiana also denied a Mandate to direct the Lake County Criminal Court to appoint counsel and furnish a transcript of the record. The petitioner is therefore foreclosed in the courts of Indiana to obtain effective appellate review because he is an indigent defendant who cannot obtain a transcript of the record at [fol. 75] public expense and because he is an indigent defendant who cannot convince the Public Defender that his cause has merit.

Indiana has created the office of Public Defender and according to that statute (Burns' 13-1402) it is the duty of that officer to represent any person in a penal institution who is without funds to employ his own counsel and who is asserting that he is unlawfully or illegally imprisoned. However, since the Supreme Court of Indiana construes this statute to mean that the Public Defender need represent only those whom he, the Public Defender, believes have meritorious causes, indigent defendants, such as this petitioner, are not afforded the equal protection guaranteed by the 14th Amendment to the Constitution of the United States.

The decisions of the Indiana Supreme Court upon consideration of the Petition for Writ of Mandamus filed by this petitioner in *Brown* v. *State* (1961), supra, and in the recent case of *McCrary* v. *State* (1961), —— Ind. ——, 173 N. E. 2d 300, continue to support the decision in *State ex rel. Casey* v. *Murray*, supra, giving the Public Defender sole discretion in determining whether or not to perfect an appeal from an order dismissing a petition for Writ of Error Coram Nobis.

Appellate review for all desiring a review of a denial of a Petition for Writ of Error Coram Nobis, and the assistance of the office of the Public Defender for indigent petitioners desiring to perfect such a review, have become integral parts of the Indiana law, and consequently, at all stages of the proceedings the Equal Protection Clause protects persons like this petitioner from that "invidious discrimination" referred to by the Supreme Court of the

United States in *Griffin* v. *Illinois* (1956), 351 U. S. 12, 18. [fol. 76] Speaking in that case the Court added, at page 19, that "(D)estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." The Court also said, "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

Indiana need not have provided the office of Public Defender to aid indigent petitioners, but having chosen so to do, Indiana cannot allow the Public Defender to pick and choose which indigents he will aid. This violates the Equal Protection Clause of the 14th Amendment to the Constitution of the United States in that it does not afford to all indigents the same right to legal aid. *Griffin* v. *Illinois*, supra, at page 18; *Smith* v. *Bennett* (1961), 365 U. S. 708, 713. That is, the discretion lodged in the Public Defender allows that officer to arbitrarily pre-judge the merits of a case of one indigent, and, upon finding the cause to be, in his opinion, without merit, decline to represent the indigent or furnish him with a transcript, while in another case, after finding the cause to be, in his opinion, meritorious, proceed to assist the indigent in obtaining a transcript and perfecting an appeal.

In passing, it might be said that this procedure allows the Public Defender to sit as the Supreme Court of Indiana by substituting his decision on the merits of a cause for that of the full bench of five judges. It therefore effectively denies to some indigents a review by the full bench, which, although not required by the Constitution of the United States, is, in fact, provided by the State of Indiana to some, and must, consequently, be afforded to all persons equally. *Griffin* v. *Illinois*, supra.

[fol. 77] In *Eskridge* v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U. S. 214, the Constitution of the State of Washington gave the accused in a criminal prosecution a right to appeal in all cases and a State law authorized the furnishing of a transcript to an indigent

defendant at public expense, if, in the opinion of the trial judge, "justice will thereby be promoted."

The trial judge in *Eskridge;* supra, would not issue a transcript because he found that justice would not be promoted. The Supreme Court said that the State of Washington denied defendant a Constitutional right guaranteed by the 14th Amendment and held, as it did in the *Griffin* case, that "(d)estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

The Court went on to say that "(T)he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right of full appellate review available to all defendants in Washington who can afford the expense of a transcript."

The *Eskridge* case is very similar to the case at bar. Indiana has provided an appellate review, but in the case of an indigent petitioner there must be an initial determination by the Public Defender on the merits of the case, and those having merit, in the mind of the Public Defender, are afforded appellate review, while those not having merit, in the mind of the Public Defender are denied review by the full bench of the Supreme Court of Indiana. This determination by the Public Defender cannot be a substitute for full appellate review accorded those who can afford to pay for a transcript.

In *Burns* v. *Ohio* (1959), 360 U. S. 252, the Supreme Court of the United States held that since a person who is [fol. 78] not an indigent may have the Ohio Supreme Court consider his petition for leave to appeal a felony conviction, denial of the same right to an indigent petitioner solely because he was unable to pay a filing fee violated the 14th Amendment. The Court said that "(T)here is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants" and went on to hold that "(T)he imposition by the State of financial barriers restricting review for indigent defendants has no place in our heritage of 'Equal Justice Under Law.'"

Again, comparing that decision of the United States Supreme Court with the facts in this case at bar, this Court

believes that there is no rational basis for assuming that some indigent petitioners' appeals will be less meritorious than those of other defendants and therefore, subjection of such appeals to a determination of a Public Defender as to the merits of the cause as a condition precedent to the hearing of the case by the full bench of the Supreme Court of Indiana is a denial to an indigent petitioner of the Equal Protection of the Laws.

It Is the Opinion of This Court that the actions of the State of Indiana have denied petitioner equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States, and it is, therefore, the order of this Court that:

1. The petitioner shall be given a full, appellate review of his Coram Nobis denial in accordance with this opinion, within ninety (90) days from the date hereof, or within such additional period of time as this Court shall hereafter determine, and,

[fol. 79]

2. Pending the supplementation of this Order and the final determination of these Habeas Corpus proceedings, this petitioner is granted a stay of execution.

Robert A. Grant, Judge.

Enter: July 26, 1961.

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[fol. 80] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

Civil No. 2904

[Title omitted]

RETURN—Filed August 29, 1961

Comes now Ward Lane, Warden of the Indiana State Prison, respondents in the above entitled cause, by his attorneys, Edwin K. Steers, Attorney General of Indiana,

and Richard C. Johnson, Deputy Attorney General, and for Return and Answer to the Writ of Habeas Corpus heretofore issued in the above entitled cause says:

1. That he is the duly appointed, qualified and acting Warden of the Indiana State Prison.

2. That he holds custody of the Petitioner by virtue of a certain commitment duly issued, pursuant to judgment entered in the Criminal Court of Lake County, Indiana, on the 13th day of December, 1957. A copy of said commitment is attached hereto, made a part hereof, and marked Respondent's Exhibit A.

[fol. 81] 3. Respondent denies each and every material allegation made in the petition as amended heretofore filed in this cause.

Wherefore, respondent herewith produces the said petitioner, George Robert Brown, in open court, together with said Writ and the aforesaid commitment and prays that the Writ be dissolved and that petitioner be remanded to the custody of the respondent.

Edwin K. Steers, Attorney General of Indiana;
Richard C. Johnson, Deputy Attorney General.

State of Indiana,
County of Madison, ss.:

Ward Lane, Warden of the Indiana State Prison, being first duly sworn upon his oath deposes and says that the allegations in the foregoing Return and Answer are true and correct as he verily believes.

Ward Lane, Warden.

Seal

Subscribed and sworn to before me, a Notary Public, this 26th day of July, 1961.

Edwin A. Gabel, Notary Public.

My Commission Expires: 4-10-65.

[fol. 82] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
Civil No. 2904

[Title omitted]

PETITIONER'S REQUEST FOR SHOW CAUSE ORDER—
Filed October 26, 1961

Comes now George N. Beamer, one of the court appointed attorneys for the petitioner herein, and shows to the court:

1. That more than Ninety (90) days have passed since the entry of the order of July 26, 1961, in which the court ordered that the petitioner be given a full appellate review of Coram Nobis denial by the Lake County Criminal Court within Ninety (90) days from July 26, 1961, or within such additional period of time as this court should thereafter determine.

2. That so far as the records show no report or showing of any kind has been made that any action has been taken by the Attorney General's office and the Courts of the State of Indiana to comply with the order of this court.

It Is Therefore, requested on behalf of said petitioner that a rule issued by this court requiring the Attorney General of Indiana:

[fol. 83] 1. To report what action, if any, has been taken by the Attorney General's office and the Courts of the State of Indiana to comply with the order of this court dated July 26, 1961.

2. If no action has been taken, to show cause why the relief prayed for by the petitioner in his Habeas Corpus petition should not be granted.

George N. Beamer, Attorney for Petitioner.

Certificate of Service (omitted in printing).

[fol. 84] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
Civil No. 2904

[Title omitted]

---

ORDER TO RESPONDENT TO SHOW WHAT ACTION HAS BEEN TAKEN—Entered October 27, 1961

Petitioner has filed in this Court a Petition to require the Attorney General of Indiana to report what action has been taken by the Attorney General's office and the Courts of the State of Indiana to comply with the July 26, 1961, Order of this Court; and, in the event no action has been taken, to show cause why the Writ should not issue.

The ninety (90) days allowed by this Court in the Order of July 26, 1961, having passed,

It Is the Order of This Court that Respondent have until and including November 10, 1961, to report to this court what action, in compliance, has been taken.

Pending this report, this Court will take no action on Petitioner's request for a "Show Cause" Order.

Robert A. Grant, Judge.

Enter: October 27, 1961.

[fol. 85] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

Civil No. 2904

[Title omitted]

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RESPONDENT'S AMENDED RESPONSE TO COURT'S ORDER OF OCTOBER 27, 1961—Filed November 8, 1961

Comes now the Attorney General of the State of Indiana, and reports to this Honorable Court that subsequent to this Court's order of July 26, 1961, the Attorney General, on August 15, 1961, filed in the Supreme Court of Indiana, under Cause No. O-604, which cause was Petitioner's request for a Writ of Mandate in the Supreme Court of Indiana, an *Affidavit to Inform the Court*, a copy of which affidavit is attached hereto, made a part hereof, and marked Respondent's Exhibit "A". To the date of this Response, no action has been taken in this matter by the Supreme Court of Indiana.

Edwin K. Steers, Attorney General of Indiana,
William D. Ruckelshaus, Deputy Attorney General, Attorneys for Respondent.

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[fol. 86] Certificate of Service (omitted in printing).

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[fol. 87]

RESPONDENT'S EXHIBIT "A"

IN THE SUPREME COURT OF INDIANA

Cause No. O-604

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George Robert Brown,

*Petitioner,*

vs.

State of Indiana,

*Respondent.*

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## AFFIDAVIT TO INFORM THE COURT

Comes now Richard C. Johnson, Deputy Attorney General of Indiana, and after being duly sworn, states as follows:

1. That on July 20, 1961, George Robert Brown, Petitioner in the above captioned cause, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Indiana, South Bend Division.

2. That said Petition for Writ of Habeas Corpus filed in the United States District Court, Northern District of Indiana, South Bend Division, is captioned and designated as United States of America *ex rel.* George Robert Brown, Petitioner, v. Ward Lane, Warden, Indiana State Prison, Respondent, Civil No. 2904.

3. That the affiant was requested by said Court to appear and argue said cause on July 26, 1961, before a Return was required to be filed or was filed in said matter.

4. That on July 26, 1961, after hearing argument, and over the objection of the affiant, an order was entered in the said matter, a photographic copy of which is attached hereto, marked "Exhibit A", and made a part hereof.

Further affiant saith not.

(signed) RICHARD C. JOHNSON
Richard C. Johnson,
Deputy Attorney General

[fol. 88] Subscribed and sworn to before me, a Notary Public, this 15th day of August, 1961.

(signed) MARJORIE A. LASLEY
Marjorie A. Lasley,
Notary Public

My Commission Expires:
January 2, 1963

(SEAL)

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[fol. 89] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

Civil No. 2904

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United States of America, ex rel.,
George Robert Brown, Petitioner,

vs.

Ward Lane, as Warden of The Indiana
State Prison, Respondent.

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ORDER TO SHOW CAUSE—Entered November 9, 1961

The Respondent filed a Response and an Amended Response to this Court's Order of October 27, 1961, saying that no action has been taken by the Attorney General in this cause other than the filing, with the Supreme Court of Indiana, in Cause No. O-604, which was Petitioner's request for a Writ of Mandate in the Supreme Court of Indiana, an Affidavit to Inform the Court. The Amended

Response also indicated that no action has been taken in this matter by the Supreme Court of Indiana.

In view of the fact that no action has been taken in this cause by the Respondent, it is now hereby ordered that the Respondent show cause why Petitioner should not be released, at a hearing to be held in the Court Room of the United States District Court at Hammond, Indiana, on Thursday, November 16, 1961, at 8 o'clock P.M. (C.S.T.). [fol. 90] The argument to be presented at the hearing is to be confined to the legal question of whether or not the Petitioner has been denied the "equal protection" of the laws by the State of Indiana in its failure to provide Petitioner a full appellate review of the denial of his Writ of Error Coram Nobis in accordance with the decision of this Court in *United States of America ex rel. George Robert Brown* v. *Ward Lane, Warden, Indiana State Prison* (D. C. N. D. Ind. 1961), 196 F. Supp. 484.

28 U. S. C. A. § 2243 provides that:

. . . .

> (U)nless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

Since the hearing is to be confined only to a question of law the Petitioner need not be present, and upon the authority vested in this Court by the above provision in 28 U. S. C. A. § 2243, it is ordered that the State shall not produce the petitioner at the hearing.

Robert A. Grant, Judge.

Enter: November 9, 1961.

[fol. 91] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

Civil No. 2904

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United States of America ex rel.,
George Robert Brown, Petitioner,

vs.

Ward Lane, Warden, Respondent.

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ORDER DISCHARGING PETITIONER, ETC.—November 16, 1961

This cause having come on for further hearing, at the request of the State of Indiana, for a determination of whether or not this Court should modify or vacate this Court's Order of July 26, 1961 in *U. S. A. ex rel. George Robert Brown* v. *Ward Lane, Warden of the Indiana State Prison* (D. C. N. D. Ind. 1961), 196 F. Supp. 484, and further arguments having been heard, this Court reiterates its earlier position, explained in its Order of July 26, 1961, and for the reasons set forth therein now holds that the State of Indiana has violated Petitioner's constitutional rights, and it is therefore

Ordered, that Petitioner be discharged from the custody of the State of Indiana, provided, however, that the Petitioner shall be detained in custody by the Respondent, pursuant to the provisions of Rule 11(c) of the Seventh [fol. 92] Circuit Court of Appeals pending Appellate review of this decision.

Robert A. Grant, Judge.

Enter: Nov. 16, 1961.

[fol. 93] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

Civil No. 2904

[Title omitted]

---

PETITION TO REMAND CUSTODY—Filed November 16, 1961

Comes now the Respondent, Ward Lane, by Edwin K. Steers, Attorney General of the State of Indiana, and William D. Ruckelshaus, Deputy Attorney General, and respectfully petitions the court to remand the custody of Petitioner, George Robert Brown, to the Respondent, Ward Lane, as Warden of the Indiana State Prison, from whom custody was taken by the granting of the Writ of Habeas Corpus; such custody to continue pending appeal to the United States Court of Appeals for the Seventh Circuit as provided for in the Rules of the United States Court of Appeals for the Seventh Circuit, Rule 11(c).

Edwin K. Steers, Attorney General of Indiana;
William D. Ruckelshaus, Deputy Attorney General.

[fol. 94] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

[Title omitted]

To: The Honorable Robert A. Grant, Judge United States District Court for the Northern District of Indiana, South Bend, Indiana.

AMENDED NOTICE OF APPEAL—Filed November 24, 1961

Pursuant to the requirements of Rule 73(b) of the Federal Rules of Civil Procedure made applicable to this cause by virtue of Rule 81(a), notice is hereby given that Ward Lane, as Warden of the Indiana State Prison, Respondent above named, by his attorneys, Edwin K. Steers, Attorney General of Indiana, and William D. Ruckelshaus, Deputy Attorney General, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order heretofore issued in this cause by the Honorable Robert A. Grant, Judge, United States District Court for the Northern District of Indiana, South Bend, Indiana, which order discharged Petitioner from the custody of Indiana, provid-[fol. 95] ing however, that the Petitioner shall be detained in custody by the Respondent, pursuant to the Provision of Rule 11(c) of the Seventh Circuit Court of Appeals pending Appellate review and which order was entered in the cause on November 16, 1961.

Edwin K. Steers, Attorney General of Indiana:
William D. Ruckelshaus, Deputy Attorney General, Attorneys for Respondent.

219 State House, Indianapolis 4, MElrose 3-5512.

[fol. 96] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
Civil No. 2904

[Title omitted]

---

To: The Honorable Robert A. Grant, Judge United States District Court for the Northern District of Indiana, South Bend, Indiana.

PETITION FOR CERTIFICATE OF PROBABLE CAUSE—
Filed December 2, 1961

Comes now the Respondent, Ward Lane, as Warden of the Indiana State Prison, by his attorneys, Edwin K. Steers, Attorney General of Indiana, and William D. Ruckelshaus, Deputy Attorney General, and petitions the Honorable Robert A. Grant, Judge of the United States District Court for the Northern District of Indiana, South Bend Division, for issuance of a Certificate of Probable Cause in the above captioned cause, in order that said Respondent might take an appeal to the United States Court of Appeals for the Seventh Circuit from the order heretofore entered by said Honorable Robert A. Grant in this [fol. 97] cause, which order discharged the petitioner from the custody of the State of Indiana, providing however, that the Petitioner should be detained in custody by Respondent pursuant to the provisions of Rule 11(c) of the Seventh Circuit Court of Appeals pending Appellate review of the order. In support of said petition, the Respondent would respectfully show the court as follows:

1. That the aforementioned order entered by the Honorable Robert A. Grant, Judge of this Court, concerns its self with a novel issue which has not been considered and ruled upon in any previous proceeding by the United States Court of Appeals for the Seventh Circuit or the United States Supreme Court.

2. That there are several other Petitions for Writ of Habeas Corpus pending before this court where substantially the same issues are presented.

3. That Respondent is of the belief that the Federal Constitutional protections do not embrace the denial of Appellate review at public expense from the denial of a Writ of Error Coram Nobis in the trial court.

4. That the Writ of Error Coram Nobis is in the nature of a civil Post Conviction remedy; and the Supreme Court of Indiana has ruled, and the Respondent is of the belief, that the Office of the Public Defender of Indiana may, in its discretion, choose not to represent a Petitioner seeking to pursue such review if there is no merit in the petitioner's alleged reasons for appeal.

Respondent respectfully represents to the Honorable Judge of this court that the above and foregoing shows the appeal, sought to be taken, to have merit; and further that such showing constitutes probable cause for reversal by the United States Court of Appeals for the Seventh Circuit.

Wherefore, Respondent respectfully prays that the Honorable Robert A. Grant, Judge of the United States Dis-
[fol. 98] trict Court for the Northern District of Indiana, South Bend Division, grant Respondent's petition herein; and further that he certify the existence of probable cause for appeal to the United States Court of Appeals for the Seventh Circuit.

Edwin K. Steers, Attorney General, William D. Ruckelshaus, Deputy Attorney General.

*Duly sworn to by William D. Ruckelshaus, jurat omitted in printing.*

[fol. 99] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

Criminal No. 2904

[Title omitted]

ORDER GRANTING PETITION—December 7, 1961

Respondent's petition for a Certificate of Probable Cause is hereby granted.

Robert A. Grant, Judge.

Enter: Dec. 7, 1961.

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[fol. 100]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13583

September Term 1961—April Session 1962

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UNITED STATES OF AMERICA ex rel. GEORGE ROBERT BROWN, Petitioner-Appellee,

v.

WARD LANE, as Warden of the Indiana State Prison, Respondent-Appellant.

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Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

OPINION—May 4, 1962

Before Duffy, Knoch and Kiley, Circuit Judges.

DUFFY, *Circuit Judge*. The matter before us is based upon a petition for a writ of habeas corpus filed by George Robert Brown, petitioner, who is under sentence of death

imposed by the Lake County (Indiana) Criminal Court upon a conviction of murder in the perpetration of robbery. The District Court granted the petition and issued the writ.

After petitioner was convicted in the State court, he filed a motion for a new trial which was denied. He perfected a timely appeal to the Indiana Supreme Court and the judgment of the lower court was affirmed. A petition for a writ of certiorari was denied by the United States Supreme Court.

[fol. 101] In February 1960, petitioner sought a writ of habeas corpus in the United States District Court for the Northern District of Indiana. It was dismissed for failure to exhaust state remedies. Petitioner then sought a writ of error *coram nobis* in the State court where he had been convicted. The Indiana Public Defender appeared in behalf of petitioner in this proceeding. After a hearing, the writ was denied.

Petitioner sought an appeal from this denial. He asked the support and help of the Public Defender who declined. He filed a motion in the Lake County Criminal Court to appoint counsel for him and to furnish the transcript of record. This motion was denied. Petitioner thereupon filed a verified petition for a writ of mandate in the Indiana Supreme Court asking that Court to direct the Lake County Criminal Court to appoint counsel and to furnish him a transcript. This petition was denied by the Indiana Supreme Court in February 1961. Petitioner then filed a petition for a writ of certiorari in the United States Supreme Court in March 1961. This petition was denied in June 1961, but without prejudice to his application for a writ of habeas corpus in the appropriate United States District Court. Whereupon petitioner filed a petition for a writ of habeas corpus in the United States District Court in July 1961 and it is from the order granting the writ that the instant appeal originates.

A hearing was held before the District Court on July 26, 1961. Thereafter the District Court handed down a written opinion[1] holding that petitioner had been denied

[1] Printed in 196 F. Supp. 484.

equal protection of the laws by the State of Indiana, and ordered a full appellate review of petitioner's *coram nobis* denial by the State of Indiana within ninety days of the date of that Court's order. No action was taken within that period by the State of Indiana, and on November 10, 1961, the District Court ordered respondent to show cause why petitioner should not be released, at a hearing to be held November 16, 1961. After a hearing on that date, the District Court issued its order granting petitioner's writ of habeas corpus, but remanding petitioner to the custody of respondent Warden, pending this appeal.

[fol. 102] The Public Defender stated his reasons for refusing to represent petitioner in perfecting an appeal to the Indiana Supreme Court from the order of the trial court overruling and denying his *coram nobis* petition. He said, in a letter:

> "After a careful review of your hearing had on June 1 on your petition for Writ of Error Coram Nobis in the Criminal Court of Lake County, will advise that I am unable to find any error or errors that would have any merit to assign upon an appeal; therefore, I am hereby informing you that my office will not appeal the judgment denying your Petition for Writ of Error Coram Nobis.
>
> "I have talked to the Chief Deputy Attorney General and he informed me that in the event my office refuses to perfect an appeal for you and if you are a pauper, and allege these facts in any petition you file in the Federal Court, the Attorney General will concede that you have exhausted your state remedies. I have no authority to appear for you in the Federal Court but I believe the Federal Judge might appoint counsel for you.
>
> "Due to the above facts, I am closing my file on your case."

The Indiana Public Defender statute is found in Burns Indiana Statute (1956 Repl.) Section 13-1401 to 13-1406 and reads in part as follows:

13-1401:

"There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the state of Indiana to serve at the pleasure of said court, for a term of four [4] years...."

13-1402:

"It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

[fol. 103] 13-1405:

"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

It is clear from the decisions of the Indiana Supreme Court that where an indigent desires to take an appeal from an adverse decision in a post-conviction remedy such as *coram nobis*, he must first obtain the assistance of the Public Defender. A prisoner is not entitled to a transcript of the record at public expense, unless he obtains same through the Public Defender. *State ex rel. Casey* v. *Murray*, 231 Ind. 74, 106 N.E. 911. Also, the Public Defender is given wide discretion in deciding whether the matters complained of present any appealable issue. *Jackson* v. *Reeves*, 238 Ind. 708, 153 N.E.2d 604.

The effect of the statute as interpreted by the Indiana Supreme Court is that a defendant who can afford to

pay for a transcript can perfect an appeal, but an indigent defendant, in order to perfect an appeal, must first secure the aid of the Public Defender, and if the latter declines, a transcript will be denied. This results in an indigent defendant being denied appellate review because Indiana Supreme Court Rule 2-40[3] requires that a "transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the Clerk of the Supreme Court. . . ." The Supreme Court of Indiana has ruled that the presence of a transcript is jurisdictional to it. *McCrary* v. *State* (1961), ..... Ind. ....., 173 N.E.2d 300, 305-307.

The petitioner herein was prevented from obtaining an effective appellate review merely and solely because he was an indigent defendant who was unable to purchase [fol. 104] a transcript of the record. Without such transcript the Supreme Court of Indiana would not assume jurisdiction.

In *Griffin et al.* v. *Illinois* (1956), 351 U.S. 12, the Supreme Court stated the issue therein as follows (p. 13): "The question presented here is whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others."

In *Griffin*, the Supreme Court further stated (p. 18): "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." The Court said further (p. 19): "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

The rule announced in *Griffin* was reaffirmed in *Eskridge* v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U.S. 214. The *Eskridge* case is similar in many

[3] Ind. Sup. Ct. 1958 Ed., Rule 2-40.

respects to the case at bar. The Constitution of the State of Washington gave the accused in a criminal prosecution a right to appeal in all cases. A Washington State law authorized the furnishing of a transcript to an indigent defendant at public expense if, in the opinion of the trial judge "justice will thereby be promoted." The trial judge in *Eskridge* found that justice would not be promoted and a transcript was not furnished. The United States Supreme Court stated (p. 216): "We do not hold that a State must furnish a transcript in every case involving an indigent defendant. But here, as in the *Griffin* case, we do hold that, '[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.'"

It is true that in each of the *Griffin* and *Eskridge* cases, a direct appeal from a conviction was involved. However, from the language used by the Supreme Court we cannot conceive that a different yardstick would be applied on an application for a writ of error *coram nobis*, an Indiana post-conviction right.

[fol. 105] In *Smith* v. *Bennett* (1961), 365 U.S. 708, the Supreme Court held that an Iowa statute which required an indigent prisoner of the State to pay a filing fee before a writ of habeas corpus would be docketed, denied the prisoner the equal protection of the laws in violation of the Fourteenth Amendment. The Court said (p. 709): "We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws."

We think the Supreme Court in *Smith* v. *Bennett* effectively disposed of the contention that the rule stated in *Griffin* and *Eskridge* is not applicable to the case at bar because a direct appeal from a criminal conviction is not involved. The Court said (p. 712): ". . . In Iowa, the writ is a post-conviction remedy available to all prisoners who have $4. We shall not quibble as to whether in this context it be called a civil or criminal action. . . . The availability of a procedure to regain liberty lost

through criminal process cannot be made contingent upon a choice of labels."

We hold the District Court was correct in determining the State of Indiana denied petitioner the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. The Court acted within its discretion in requiring a full appellate review of petitioner's *coram nobis* denial within a period of ninety days. The State of Indiana chose to ignore this order. The District Court was left with no alternative but to order petitioner's discharge from custody, but under the circumstances, properly ordered that he be detained in the custody of the warden pending the appeal to this Court.

We direct that petitioner continue to be detained in the custody of the warden during that period during which a petition for certiorari may properly be filed with the Supreme Court of the United States to review the decision of this Court, and if such a petition be granted, then for such period of time until the United States Supreme Court has made final disposition of this case. An order for a stay of execution for the same period will be entered. Thereafter, the United States District Court may enter an order of final disposition.

[fol. 106] We wish to acknowledge the services in this Court of Nathan Levy, Esquire, of South Bend, Indiana. His services were painstaking and his brief very helpful.

Affirmed.

[fol. 107]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before

Hon. F. Ryan Duffy, Circuit Judge. Hon. Win G. Knoch, Circuit Judge. Hon. Roger J. Kiley, Circuit Judge.

No. 13583

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UNITED STATES OF AMERICA, ex rel. GEORGE ROBERT BROWN,
Petitioner-Appellee,

vs.

WARD LANE, as Warden of the Indiana State Prison,
Respondent-Appellant.

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Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

JUDGMENT—May 4, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

It is directed that petitioner continue to be detained in the custody of the warden during that period during which a petition for certiorari may properly be filed with the Supreme Court of the United States to review the decision of this Court, and if such a petition be granted, then for such period of time until the United States Supreme Court has made final disposition of this case. An order for a stay of execution for the same period is hereby entered. Thereafter, the United States District Court may enter

an order of final disposition, in accordance with the opinion of this Court.

[fol. 108] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 109] SUPREME COURT OF THE UNITED STATES

No. 283—October Term, 1962

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WARD LANE, Warden, Petitioner,

vs.

GEORGE ROBERT BROWN.

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ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is set for argument immediately following No. 201.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1961

NO. 283

UNITED STATES OF AMERICA EX REL.,
GEORGE ROBERT BROWN, *Respondent*,

vs.

WARD LANE, as Warden of the Indiana State Prison,
*Petitioner*.

## PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# INDEX

IN THE

# Supreme Court of the United States

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NO.

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vs.

WARD LANE, as Warden of the Indiana State Prison,
*Petitioner.*

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## PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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### THE OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *United States ex rel. George Robert Brown* v. *Lane* (1962), 302 F.2d 537. It is reprinted in full as an appendix to this petition.

The opinion of the United States District Court is reported as *United States ex rel. George Robert Brown* v. *Lane* (1961), 196 F. Supp. 484. It is reprinted in full in the nine (9) copies of the record filed with this petition pursuant to Supreme Court Rule 23 (i).

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 4, 1962.

No petition for rehearing was filed.

## THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION

This Court's jurisdiction over this petition for certiorari is conferred by Title 28, Section 2101 of the United States Judicial Code, which authorizes this Court to grant certiorari to review judgments of United States Courts of Appeal on petitions filed within ninety (90) days from the date of entry of such judgment.

## THE QUESTION PRESENTED

The sole question presented is:

> 1. Did the District Court and the Court of Appeals err in finding that respondent herein, an indigent, had been denied due process and/or equal protection of law under the fourteenth amendment to the United States Constitution because the State of Indiana conditioned his right to appeal from a denial of his writ of error coram nobis upon a determination of his appeal's merit by the public defender?

## THE FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional provision involved in this appeal is: the Fourteenth Amendment, Section 1, to the United States Constitution.

> 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citi-

zens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indiana Public Defender Act reads in relevant part as follows:

2. Ind. Acts 1945, Ch. 38, Sec. 1 as found in Burns Indiana Statutes 13-1401:

"There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the State of Indiana to serve at the pleasure of said court, for a term of four [4] years. He shall be a resident of the state of Indiana and a practicing lawyer of this state for at least three [3] years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment."

3. Ind. Acts 1945, Ch. 38, Sec. 2 as found in Burns Indiana Statutes 13-1402:

"It shall be the duty of the public defender to represent any person in any penal institution of this state who is, without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

4. Ind. Acts 1945, Ch. 38, Sec. 5 as found in Burns Indiana Statutes 13-1405:

"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any

prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

Rule 2-40 of the Indiana Supreme Court, rgads as follows:

5. "An appeal may be taken to the Supreme Court from a judgment granting or denying a petition for a writ of error coram nobis. The sufficiency of the pleadings and of the evidence to entitle the petitioner to a vacation of the judgment will be considered upon an assignment of error that the finding is contrary to law. The transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the clerk of the Supreme Court within ninety (90) days after the date of the decision. The provisions of the rules of this court applicable to appeals from final judgments shall govern as to the form and time of filing briefs. All proceedings in the lower court shall be stayed until the appeal is determined, but no petitioner shall be entitled to bail if the petition is granted, after the state serves notice that an appeal will be prosecuted, by filing written notice thereof with the court in term or judge in vacation. If a judgment vacating the original judgment be affirmed on appeal, or no appeal be prosecuted within the time herein limited, the petitioner shall be entitled to bail under the same conditions an offense may be bailable before trial. The petitioner, or the state shall be entitled to a change of judge for the same causes and under the same procedure provided in civil actions."

## CONCISE STATEMENT OF THE CASE

### A.

### NATURE OF THE CASE AND ITS DISPOSITION IN THE DISTRICT AND APPELLATE COURTS.

This action commenced as a Petition for Writ of Habeas Corpus brought on July 19, 1961, by Respondent, to contest the legality of his detention in the Indiana State Prison by Warden, Ward Lane. Petitioner was ordered by the District Court to show cause on or before July 25, 1961, why the writ should not issue. Hearing was held on July 26, 1961, and after oral argument the District Court found in a written opinion that Respondent had been denied equal protection of the laws of the State of Indiana, and ordered a full appellate review of Respondent's Coram Nobis denial by the State of Indiana within ninety (90) days of the date of that Court's order; and, further, ordered a stay of Respondent's execution.

It appearing that no action had been taken by the State of Indiana to comply with the District Court's July 26, 1961, determination, the District Court on November 10, 1961, ordered Petitioner to show cause why Respondent should not be released at a hearing to be held November 16, 1961. After hearing, the District Court issued its order granting Respondent's Writ of Habeas Corpus, but remanded Respondent back to the custody of Petitioner.

Petitioner perfected an appeal to the Seventh Circuit Court of Appeals. That Court affirmed the decision of the District Court on May 4, 1962, and ordered Respondent to be detained in custody until the time for filing a petition for certiorari should have expired, and if such petition

should be filed and granted, until the Supreme Court of the United States has made final disposition of the case.

## PETITION FOR WRIT OF HABEAS CORPUS

This cause was initiated in the District Court by the filing of a verified Petition for Writ of Habeas Corpus. The petition alleged that Respondent was tried, and convicted, of MURDER IN THE PERPETRATION OF ROBBERY and sentenced to death in the Lake County Criminal Court and his Motion for New Trial was overruled in February, 1958. Respondent perfected a timely appeal to the Indiana Supreme Court and the judgment of the lower court was affirmed.

Thereafter, a Petition for a Writ of Certiorari was denied by the Supreme Court of the United States. In February, 1960, Respondent sought a Writ of Habeas Corpus in the District Court for the Northern District of Indiana. Said petition was dismissed for failure to exhaust State remedies. Respondent then sought a Writ of Error Coram Nobis in Lake County, Indiana Criminal Court. The Indiana Public Defender appeared on behalf of Respondent in this proceeding. After a hearing, the writ was denied by the Lake County Court. Respondent sought an appeal from this denial and having been unsuccessful in eliciting the support of the Public Defender, filed a motion in the Lake County Court to appoint counsel and furnish the transcript of record. The Lake County Court denied this motion in July, 1960. Respondent thereupon filed a Verified Petition for a Writ of Mandate in the Indiana Supreme Court praying that Court to direct the Lake County Court to appoint him counsel and furnish him a transcript. This petition was denied by the Indiana Supreme Court in

February, 1961. Respondent filed a Writ of Certiorari in the United States Supreme Court in March, 1961. This petition was denied in June, 1961, without prejudice to his application for a Writ of Habeas Corpus in the appropriate United States District Court. Whereupon Respondent filed a Petition for Writ of Habeas Corpus in the District Court on July 19, 1961.

Respondent's writ was based on five grounds. The only ground that is before this Court is Ground Five (5), as that is the basis of the District and Appellate Courts' decisions. That is that Respondent has been denied equal protection of the law, in that he was effectively denied an appeal from the order of the Lake County, Indiana Criminal Court, because of his poverty and inability to secure a transcript, which right of appeal is available to all defendants in Indiana who can afford the expense of a transcript.

The District Court had jurisdiction to entertain Respondent's Petition for Writ of Habeas Corpus under authority of Title 28, U.S.C.A., § 2241.

## REASONS FOR ALLOWANCE OF THE WRIT

Rule 19(a) of the Supreme Court of the United States indicates that one of the considerations, which this Court weighs in deciding whether to grant a writ of certiorari, is where a Federal Appellate Court has decided an important state question in conflict with applicable State law.

The decision of the Court of Appeals for the Seventh Circuit (see Appendix), and the District Court decision (see Appendix filed in Seventh Circuit), are in direct conflict with the decisions of the Supreme Court of Indiana.

In *Brown* v. *State* (1961), — Ind. —, 171 N. E. (2d) 825, 827, the Supreme Court of Indiana stated:

> "We therefore conclude that if, as it appears in this case, a belated proceeding in error coram nobis has been had and adjudged against a convicted defendant, and the public defender, who is a former jurist and an eminently qualified trial lawyer, has made a careful review of the proceedings on behalf of such defendant, and has determined that he is 'unable to find any error or errors that would have any merit to assign upon an appeal,' and so advises the convicted defendant, the state has thereby afforded to the defendant every reasonable guarantee of due process as contemplated by the Constitution of the United States and of the State of Indiana. U. S. Const. Amend. 14; Const. art. 1, § 12."

In *Willoughby* v. *State* (1961), — Ind. —, 177 N. E. (2d) 464, 471, the Supreme Court of Indiana stated:

> "We are keenly aware that equal protection must be given to all citizens by our courts in so far as this is possible. However, it is not contemplated that every convicted criminal without means be furnished at public expense with a transcript of his trial, as a personal memento to him of his latest escapage [sic] against society, nor is it contemplated that such a record be provided for the entertainment of the convicted criminal and his fellow inmates merely because the statute [§ 4-3511, supra] provides that he is entitled to such a record. The legislature, by this enactment, did not contemplate that the state should be required to expend public funds for appeals which are obviously frivolous and therefore futile. Neither is it reasonable to contend that this court should be required to give its time and consideration to the formality of such spurious appeals, which, under a different ruling, could be required in every pauper

case. The expense of such a record can be justified only on the ground that it be made available for the purpose of an appeal from a conviction, in which there is some probable cause for reversal.

"The above conclusion is consistent with the fundamental principles that: (1) there is no presumption of error in the trial court, Campbell v. State, Ind. 1960, 169 N. E. 2d 604; and (2) public funds are not to be spent without some valid reason. See Hamilton v. Baker, Judge, etc., 1955, 234 Ind. 283, 126 N. E. 2d 12. Upon this subject, Mr. Justice Frankfurter of the Supreme Court of the United States stated the controlling principles of law in the case of Griffin v. Illinois, 1955, 351 U. S. 12, 24, 76 S. Ct. 585, 593, 100 L.Ed. 891, as follows:

> "'When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.'"

"See also: McCrary v. State, supra [Ind. 173 N. E. 2d 300]; Brown v. State, Ind. 1961, 171 N. E. 2d 825; State ex rel. Casey v. Murray, supra [231 Ind. 74, 106 N. E. 2d 911]; State ex rel. Pappas v. Baker, Judge, 1935, 209 Ind. 25, 197 N. E. 912; Indiana Law Journal Vol. 36, p. 237.

"From common experience we know that a convicted defendant, who is financially able to do so, and therefore required by law to pay the costs of appeal, would not incur such costs against the advice of counsel who could find no error as cause for appeal unless, of

course, such convicted defendant had personal knowledge of some specific error which he could *pro se* present to this court, contrary to the advice of counsel. By the same logic it is not reasonable to contend that equal protection under the law requires that the state must pay the cost of appeal for a poor person against the advice of counsel and in the absence of any showing of probable cause for appeal, merely because the convicted person is an indigent.

"Under our law which affords every accused person the right of asserting every available defense by competent counsel, with the opportunity (as in this case) of judicial review by this court over the action of such counsel, the state of Indiana has afforded to indigent defendants and non-indigent defendants alike, insofar as is reasonably possible, equal protection under the law in both the trial courts and on appeal."

The decisions in Indiana run directly contrary to the decisions of the Appellate and District Courts.

The resolution of this question is extremely important to the State of Indiana, as it casts a shadow over their entire post conviction appeal procedure. The Supreme Court of Indiana feels quite strongly that the procedure adopted by Indiana for allowing indigents appeals from a denial of a post conviction remedy, does not deprive the indigents of their constitutional rights as protected by the Fourteenth Amendment to the United States Constitution.

The Federal Courts have just as strongly held that the procedure works a deprivation to the constitutional rights of indigents.

If the Federal Courts are correct in their interpretation of the Constitution, then the effect in Indiana will be wide-

spread, as many indigents have been treated in the same manner as Respondent.

For the above reasons, Petitioner strongly urges that this honorable court grant Petitioner's Writ of Certiorari.

Respectfully submitted,

EDWIN K. STEERS,
Attorney General of Indiana

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General
Attorneys for Petitioner
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Indianapolis 4, Indiana
ME 3-5512

# In the
# United States Court of Appeals
## For the Seventh Circuit

No. 13583 SEPTEMBER TERM 1961—APRIL SESSION 1962

UNITED STATES OF AMERICA ex rel. GEORGE ROBERT BROWN,
*Petitioner-Appellee,*
v.
WARD LANE, as Warden of the Indiana State Prison,
*Respondent-Appellant.*

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

May 4, 1962

Before DUFFY, KNOCH and KILEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* The matter before us is based upon a petition for a writ of habeas corpus filed by George Robert Brown, petitioner, who is under sentence of death imposed by the Lake County (Indiana) Criminal Court upon a conviction of murder in the perpetration of robbery. The District Court granted the petition and issued the writ.

After petitioner was convicted in the State court, he filed a motion for a new trial which was denied. He perfected a timely appeal to the Indiana Supreme Court and the judgment of the lower court was affirmed. A petition for a writ of certiorari was denied by the United States Supreme Court.

In February 1960, petitioner sought a writ of habeas corpus in the United States District Court for the Northern District of Indiana. It was dismissed for failure to exhaust state remedies. Petitioner then sought a writ of error *coram nobis* in the State court where he had been convicted. The Indiana Public Defender appeared in behalf of petitioner in this proceeding. After a hearing, the writ was denied.

Petitioner sought an appeal from this denial. He asked the support and help of the Public Defender who declined. He filed a motion in the Lake County Criminal Court to appoint counsel for him and to furnish the transcript of record. This motion was denied. Petitioner thereupon filed a verified petition for a writ of mandate in the Indiana Supreme Court asking that Court to direct the Lake County Criminal Court to appoint counsel and to furnish him a transcript. This petition was denied by the Indiana Supreme Court in February 1961. Petitioner then filed a petition for a writ of certiorari in the United States Supreme Court in March 1961. This petition was denied in June 1961, but without prejudice to his application for a writ of habeas corpus in the appropriate United States District Court. Whereupon petitioner filed a petition for a writ of habeas corpus in the United States District Court in July 1961, and it is from the order granting the writ that the instant appeal originates.

A hearing was held before the District Court on July 26, 1961. Thereafter the District Court handed down a written opinion[1] holding that petitioner had been denied equal protection of the laws by the State of Indiana, and ordered a full appellate review of petitioner's *coram nobis* denial by the State of Indiana within ninety days of the date of that Court's order. No action was taken within that period by the State of Indiana, and on November 10, 1961, the District Court ordered respondent to show cause why petitioner should not be released, at a hearing to be held November 16, 1961. After a hearing on that date, the District Court issued its order granting petitioner's writ of habeas corpus, but remanding petitioner to the custody of respondent Warden, pending this appeal.

[1] Printed in 196 F. Supp. 484.

The Public Defender stated his reasons for refusing to represent petitioner in perfecting an appeal to the Indiana Supreme Court from the order of the trial court overruling and denying his *coram nobis* petition. He said, in a letter:

> "After a careful review of your hearing had on June 1 on your petition for Writ of Error Coram Nobis in the Criminal Court of Lake County, will advise that I am unable to find any error or errors that would have any merit to assign upon an appeal; therefore, I am hereby informing you that my office will not appeal the judgment denying your Petition for Writ of Error Coram Nobis.
>
> "I have talked to the Chief Deputy Attorney General and he informed me that in the event my office refuses to perfect an appeal for you and if you are a pauper, and allege these facts in any petition you file in the Federal Court, the Attorney General will concede that you have exhausted your state remedies. I have no authority to appear for you in the Federal Court but I believe the Federal Judge might appoint counsel for you.
>
> "Due to the above facts, I am closing my file on your case."

The Indiana Public Defender statute is found in Burns Indiana Statute (1956 Repl.) Section 13-1401 to 13-1406 and reads in part as follows:

> 13-1401:
> "There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the state of Indiana to serve at the pleasure of said court, for a term of four [4] years. . . ."
>
> 13-1402:
> "It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

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"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

It is clear from the decisions of the Indiana Supreme Court that where an indigent desires to take an appeal from an adverse decision in a post-conviction remedy such as *coram nobis*, he must first obtain the assistance of the Public Defender. A prisoner is not entitled to a transcript of the record at public expense, unless he obtains same through the Public Defender. *State ex rel. Casey* v. *Murray*, 231 Ind. 74, 106 N.E. 2d 911. Also, the Public Defender is given wide discretion in deciding whether the matters complained of present any appealable issue. *Jackson* v. *Reeves*, 238 Ind. 708, 153 N.E.2d 604.

The effect of the statute as interpreted by the Indiana Supreme Court is that a defendant who can afford to pay for a transcript can perfect an appeal, but an indigent defendant, in order to perfect an appeal, must first secure the aid of the Public Defender, and if the latter declines, a transcript will be denied. This results in an indigent defendant being denied appellate review because Indiana Supreme Court Rule 2-40[2] requires that a "transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the Clerk of the Supreme Court. . . ." The Supreme Court of Indiana has ruled that the presence of a transcript is jurisdictional to it. *McCrary* v. *State* (1961), ..... Ind. ....., 173 N.E.2d 300, 305-307.

The petitioner herein was prevented from obtaining an effective appellate review merely and solely because he was an indigent defendant who was unable to purchase

[2] Ind. Sup. Ct. 1968 Ed., Rule 2-40.

a transcript of the record. Without such transcript the Supreme Court of Indiana would not assume jurisdiction.

In *Griffin et al.* v. *Illinois* (1956), 351 U.S. 12, the Supreme Court stated the issue therein as follows (p. 13): "The question presented here is whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others."

In *Griffin*, the Supreme Court further stated (p. 18): "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." The Court said further (p. 19): "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

The rule announced in *Griffin* was reaffirmed in *Eskridge* v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U.S. 214. The *Eskridge* case is similar in many respects to the case at bar. The Constitution of the State of Washington gave the accused in a criminal prosecution a right to appeal in all cases. A Washington State law authorized the furnishing of a transcript to an indigent defendant at public expense if, in the opinion of the trial judge "justice will thereby be promoted." The trial judge in *Eskridge* found that justice would not be promoted and a transcript was not furnished. The United States Supreme Court stated (p. 216): "We do not hold that a State must furnish a transcript in every case involving an indigent defendant. But here, as in the *Griffin* case, we do hold that, '[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.'"

It is true that in each of the *Griffin* and *Eskridge* cases, a direct appeal from a conviction was involved. However, from the language used by the Supreme Court we cannot conceive that a different yardstick would be applied on an application for a writ of error *coram nobis*, an Indiana post-conviction right.

In *Smith* v. *Bennett* (1961), 365 U.S. 708, the Supreme Court held that an Iowa statute which required an indigent prisoner of the State to pay a filing fee before a writ of habeas corpus would be docketed, denied the prisoner the equal protection of the laws in violation of the Fourteenth Amendment. The Court said (p. 709): "We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws."

We think the Supreme Court in *Smith* v. *Bennett* effectively disposed of the contention that the rule stated in *Griffin* and *Eskridge* is not applicable to the case at bar because a direct appeal from a criminal conviction is not involved. The Court said (p. 712): ". . . In Iowa, the writ is a post-conviction remedy available to all prisoners who have $4. We shall not quibble as to whether in this context it be called a civil or criminal action. . . . The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels."

We hold the District Court was correct in determining the State of Indiana denied petitioner the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. The Court acted within its discretion in requiring a full appellate review of petitioner's *coram nobis* denial within a period of ninety days. The State of Indiana chose to ignore this order. The District Court was left with no alternative but to order petitioner's discharge from custody, but under the circumstances, properly ordered that he be detained in the custody of the warden pending the appeal to this Court.

We direct that petitioner continue to be detained in the custody of the warden during that period during which a petition for certiorari may properly be filed with the Supreme Court of the United States to review the decision of this Court, and if such a petition be granted, then for such period of time until the United States Supreme Court has made final disposition of this case. An order for a stay of execution for the same period will be entered. Thereafter, the United States District Court may enter an order of final disposition.

We wish to acknowledge the services in this Court of Nathan Levy, Esquire, of South Bend, Indiana. His services were painstaking and his brief very helpful.

AFFIRMED.

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1962

No. 283

WARD LANE, as Warden of the Indiana State Prison,
*Petitioner.*

*v.*

UNITED STATES OF AMERICA EX REL.,
GEORGE ROBERT BROWN,
*Respondent,*

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITIONER'S BRIEF

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## PETITIONER'S BRIEF

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### Opinion Below

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 302 Fed. 2d (7th Cir. 1962), 537.

The opinion of the United States District Court for the Northern District of Indiana, South Bend Division, is reported in 196 Fed. Supp. 484.

## Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on the 4th day of May, 1962.

On Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit, this case was docketed July 28, 1962.

The jurisdiction of this Court was invoked under provision of 28 U.S.C. Sec. 1254 (1).

The Writ of Certiorari was granted by this Court on October 8, 1962.

## Constitutional Provisions and Statutes Involved

The constitutional provision involved is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> Fourteenth Amendment of the Constitution of the United States, Section 1.

The statutory provisions involved as are follows:

1. Indiana Acts 1945, Ch. 38, Sec. 1, as found in Burns' Indiana Statutes, Section 13-1401:

> "There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the State of Indiana to serve

at the pleasure of said court, for a term of four [4] years. He shall be a resident of the state of Indiana and a practicing lawyer of this state for at least three [3] years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment."

2. Indiana Acts 1945, Ch. 38, Sec. 2, as found in Burns' Indiana Statutes, Section 13-1402:

"It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

3. Indiana Acts 1945, Ch. 38, Sec. 3, as found in Burns' Indiana Statutes, Section 13-1403:

"The public defender shall be provided with a seal of his office on which shall appear the words 'Public Defender, State of Indiana.' The public defender shall have the power to take acknowledgements, and administer oaths, and do all other acts now authorized by law for notary publics, Provided, each of said acts shall be attested by his official seal."

4. Indiana Acts 1945, Ch. 38, Sec. 4, as amended, and as found in Burns' Indiana Statutes, Section 13-1404:

"The public defender shall be paid an annual salary to be fixed by the supreme court of this state. He may, with the consent of said court, appoint or employ such deputies, stenographers or other clerical help as may be required to discharge his duties at compensation to be fixed by the court. He shall be provided with an office at a place to be located

and designated by the Supreme Court, and he shall be paid his actual necessary and reasonable traveling expenses, including cost of food and lodging when away from the municipality in which his office is located on business of the office of the public defender, and he shall be provided with office furniture, fixtures and equipment, books, stationery, printing services, postage and supplies."

5. Indiana Acts 1951, Ch. 132, Sec. 2, as found in Burns' Indiana Statutes, Section 13-1404a:

"Notwithstanding the provisions of any other law enacted by the 87th General Assembly, there is hereby appropriated annually out of funds of the state not otherwise appropriated a sufficient amount to pay salaries and expenses authorized by this act."

6. Indiana Acts 1945, Ch. 38, Sec. 5, as found in Burns' Indiana Statutes, Section 13-1405:

"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

7. Indiana Acts 1945, Ch. 38, Sec. 6, as found in Burns' Indiana Statutes, Section 13-1406:

"All claims for salary or other expenses authorized by this act shall be allowed and approved by the Supreme Court. There is hereby appropriated annually out of funds of the state not otherwise appropriated a sufficient amount to pay salaries and expenses authorized by this act."

## Question Presented

The sole question presented is:

1. Did the District Court and the Court of Appeals err in finding that Respondent herein, an indigent, had been denied due process and/or equal protection of law under the Fourteenth Amendment to the United States Constitution because the State of Indiana conditioned his right to appeal from a denial of his Writ of Error Coram Nobis upon a determination of his appeal's merit by the Public Defender?

## Concise Statement of the Case

### A.

### Nature of the Case and Its Disposition in the District Court

This action was initiated by a Petition for Writ of Habeas Corpus brought on July 19, 1961, by the Respondent to contest the legality of his detention in the Indiana State Prison by Warden, Ward Lane. (R. 10) Petitioner was ordered by the District Court to show cause on or before July 25, 1961, why the writ should not issue. Hearing was held on July 26, 1961, and after oral argument the District Court found in a written opinion that Respondent had been denied equal protection of the laws by the State of Indiana and ordered a full appellate review of Respondent's Coram Nobis denial by the State of Indiana within ninety (90) days of the date of that Court's order, and further ordered a stay of Respondent's execution. (R. 57)

It appearing that no action had been taken by the State of Indiana to comply with the District Court's July 26, 1961 determination, the District Court on November 10, 1961,

ordered Petitioner to show cause why Respondent should not be released at a hearing to be held November 16, 1961. (R. 69) After hearing, the District Court issued its order granting Respondent's Writ of Habeas Corpus, but remanded Respondent back to the custody of Petitioner pending this appeal. Petitioner filed his Notice of Appeal and Petition for Certificate of Probable Cause which was granted by the Judge of the District Court.

The case was docketed and heard by the Court of Appeals for the Seventh Circuit, and that Court rendered its opinion on May 4, 1962, in favor of Respondent. (R. 76) Thereafter, Petitioner filed his Petition for Certiorari with this Court and it was granted on October 8, 1962.

**Petition for Writ of Habeas Corpus**

This cause was initiated in the District Court by the filing of a Verified Petition for Writ of Habeas Corpus. The petition alleged that Respondent was tried, and convicted, of MURDER IN THE PERPETRATION OF ROBBERY and sentenced to death in the Lake County Criminal Court and his Motion for New Trial was overruled in February, 1958. (R. 11) Petitioner, Respondent herein, perfected a timely appeal to the Indiana Supreme Court and the judgment of the lower court was affirmed. (R. 11)

Thereafter a Petition for a Writ of Certiorari was denied by the Supreme Court of the United States. (R. 11) In February, 1960 Respondent sought a Writ of Habeas Corpus in the District Court for the Northern District of Indiana. (R. 11) Said petition was dismissed for failure to exhaust State remedies. (R. 12)

Respondent then sought a Writ of Error Coram Nobis in the Lake County Indiana Criminal Court. (R. 13) The

Indiana Public Defender appeared on behalf of Respondent in this proceeding. After a hearing the writ was denied by the Lake County Court. (R. 13) Respondent sought an appeal from this denial and having been unsuccessful in eliciting the support of the Public Defender, filed a motion in the Lake County Court to appoint counsel and furnish the transcript of record. (R. 13) The Lake County Court denied this motion in July, 1960. (R. 13) Respondent thereupon filed a Verified Petition for a Writ of Mandate in the Indiana Supreme Court praying that Court to direct the Lake County Court to appoint him counsel and furnish him a transcript. This petition was denied by the Indiana Supreme Court in February, 1961. (R. 13) Respondent filed a Writ of Certiorari in the United States Supreme Court in March, 1961. This petition was denied in June, 1961, without prejudice to his application for a Writ of Habeas Corpus in the appropriate United States District Court. (R. 14) Whereupon Respondent filed a Petition for Writ of Habeas Corpus in the District Court on July 19, 1961, from which this present cause originates. (R. 10)

Respondent's writ was based on five (5) grounds. The only ground that is before this Court is Ground Five (5), as that was the basis of the District and Circuit Courts' orders. That is that Respondent has been denied equal protection of the law, in that he was effectively denied an appeal from the order of the Lake County, Indiana Criminal Court, because of his poverty and inability to secure a transcript, which right of appeal is available to all defendants in Indiana who can afford the expense of a transcript.

## Hearing and Order

In the hearing on July 26, 1961, oral argument was heard by the District Court, and the State was ordered in an

opinion to give Respondent a full appellate review within ninety (90) days of the issuance of the order. (R. 57-63)

**Return, Show Cause, and Final Order**

Petitioner filed a Return on August 29, 1961, certifying the cause of Respondent's detention to be certain commitments issuing from the Lake County Criminal Court on December 13, 1957, whereby Respondent was sentenced to death for having committed the crime of murder in the first degree in the perpetration of robbery. (R. 63)

No action was taken by the State to comply with the District Court's order. The District Court held a hearing for Petitioner to show cause why Respondent should not be released on November 16, 1961. (R. 69) Oral arguments were heard and the District Court ordered the Respondent discharged, but remanded back in custody pending appeal to the Seventh Circuit Court of Appeals. (R. 71)

Petitioner filed his Notice of Appeal on November 16, 1961, and Amended Notice of Appeal on November 24, 1961. (R. 73)

On December 26, 1961, the record was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, and that Court rendered its decision on May 4, 1962. (R. 76)

The Supreme Court of the United States granted certiorari to the Seventh Circuit Court of Appeals on October 8, 1962, and set the case for argument following No. 201. (R. 84)

## ARGUMENT

### Indiana has not, by the Operation of its law, denied respondent in this cause the equal protection or due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The fact situation in this cause is not disputed. Respondent, as an indigent, must apply to the Public Defender of the State of Indiana in order to perfect an appeal from a denial of a Writ of Error Coram Nobis in the trial court. The question before this Court, as posed by the District and Circuit Courts' decisions, is whether this fact has denied the Respondent equal protection or due process under the Fourteenth Amendment to the Constitution of the United States.

The function of the Office of Public Defender of Indiana is defined both by statute and case law. The Indiana Public Defender statute, Indiana Acts of 1945, Ch. 38, Secs. 1 to 6, p. 81, as found in Burns' Indiana Statutes (1956 Repl.), Sections 13-1401 to 13-1406, reads in part as follows:

13-1401:

> "There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the State of Indiana to serve at the pleasure of said court, for a term of four [4] years. He shall be a resident of the State of Indiana and a practicing lawyer of this state for at least three [3] years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment."

13-1402:

> "It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

13-1405:

> "The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

It can thus be seen that the Public Defender is appointed by the Supreme Court of the State of Indiana to represent indigent prisoners after their time for appeal has expired. He is authorized to pay for transcripts of any court proceeding for any prisoner he represents. This procedure is peculiar to Indiana. The purpose of the statute has been described by the Supreme Court of Indiana as follows:

> "• • • The purpose of the statute is to provide legal aid at public expense for those who voluntarily seek and otherwise could not obtain the advice and assistance of a competent attorney. • • •"
>
> *State ex rel. Fulton v. Schannen* (1945), 224 Ind. 55, 58, 64 N. E. (2d) 798.

Decisions of the Indiana Supreme Court have made it clear that where an indigent desires to take an appeal from an adverse decision in a post-conviction remedy, such as coram nobis, he must first obtain the assistance of the Public Defender.

*State ex rel. Casey v. Murray* (1952), 231 Ind. 74, 106 N. E. (2d) 911;

*Brown v. State* (1961), — Ind. —, 171 N. E. (2d) 825;

*Willoughby v. State* (1961), — Ind. —, 177 N. E. (2d) 465.

The Public Defender has been given wide discretion in deciding whether the matters complained of present any appealable issue.

*Jackson v. Reeves* (1958), 238 Ind. 708, 153 N. E. (2d) 603;

*State ex rel. Casey v. Murray* (1952), 231 Ind. 74, 106 N. E. (2d) 911.

In *McCrary v. State* (1961), — Ind. —, 173 N. E. (2d) 300, at page 306, the Supreme Court of Indiana said:

> "The Public Defender is not required to make a travesty of his office by preparing and filing an appeal which after proper investigation, he believes to be frivolous or without such merit as he could in good conscience present to this court for consideration. While it is the duty of the Public Defender to present, in favor of the prisoners whom he undertakes to represent, by every honorable and ethical means available, every remedy or defense that is authorized by law, this does not mean that he must violate ethical standards and his conscience by interposing defenses and prosecuting appeals in which

there is no good faith or reasonable basis for such action. State ex rel. White v. Hilgemann, 1941, 218 Ind. 572, 578, 579, 34 N. E. 2d 129.

"The Public Defender is governed by the same rules of legal ethics as are lawyers generally, and when he has made a thorough investigation of the case, as was done here, and found no errors or omission which would, in the conscience of an ethical lawyer, furnish merit for an appeal, he properly exercised his discretion in refusing to spend the public's money to pursue it further. Ellis v. United States, supra, 1958, 356 U. S. 674, 78 S. Ct. 974, 2 L. Ed. 2d 1060; Brown v. State, Ind. 1961, 171 N. E. 2d 825, supra."

In the present cause, the Public Defender appeared on Respondent's behalf in the Lake County Criminal Court in his hearing on the Coram Nobis writ. (R. 40) However, the Public Defender declined to represent the Respondent in his appeal from the denial of his Writ of Error Coram Nobis in the following words:

"That Relator then requested the Public Defender to represent him in perfecting an appeal to the Indiana Supreme Court from the order of the Trial Court overruling and denying his coram nobis petition, but said Public Defender refused to do so in the following letter to Relator:

"'After a careful review of your hearing had on June 1 on your petition for Writ of Error Coram Nobis in the Criminal Court of Lake County, will advise that I am unable to find any error or errors that would have any merit to assign upon an appeal; therefore, I am hereby informing you that my office will not appeal the judgment denying your Petition for Writ of Error Coram Nobis.

> "'I have talked to the Chief Deputy Attorney General and he informed me that in the event my office refuses to perfect an appeal for you and if you are a pauper, and allege these facts in any petition you file in the Federal Court, the Attorney General will concede that you have exhausted your state remedies. I have no authority to appear for you in the Federal Court but I believe the Federal Judge might appoint counsel for you.
>
> "'Due to the above facts, I am closing my file on your case.
>
> "'Yours truly,
>
> "'Robert S. Baker
>
> "'Public Defender of Indiana.'"

(R. 40-41)

It is the legal power of the Public Defender to make this decision, and its consequent effect on Respondent's right to appeal from his Coram Nobis proceeding that the District and Circuit Courts decided was a denial of equal protection and due process to Respondent.

Petitioner concedes that if Respondent has sufficient funds, he could buy a transcript of the hearing on his Coram Nobis Writ in the Lake County Criminal Court. If he could not secure counsel, he could appeal *pro se*. The State of Indiana has thus, through its laws, both statutory and decisional, created a classification between indigents and non-indigents for the purpose of belated appeals and the Writs of Coram Nobis and Habeas Corpus. If the mere creation of such a classification for the purpose of appeals is a violation of the "equal protection" clause, then assuredly the Indiana law is so violative. Petitioner respectfully

submits that such a classification is not a violation of equal protection under the Fourteenth Amendment to the United States Constitution. Just such a classification was contemplated by Justice Frankfurter in *Griffin v. Illinois* (1956), 351 U. S. 12, when, in his concurring opinion, he stated at page 24:

> "• • • When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing a review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

Judge Prettyman has spoken to the same effect in *Cash v. United States* (D.C.C.A. 1958), 26 F. 2d 731:

> "It is sad but true that nobody can supply to the poor every privilege possessed by the well-to-do. Every indigent cannot be afforded defense by one of the most skilled, most experienced lawyers at the bar. People who have the money and wish to spend it for a foolish, useless litigation can do so. No principle, either legal or moral, implies that the public ought to supply indigents with the costs of foolish or useless litigation. • • •"

Other jurisdictions have held that a classification may be made between indigents and non-indigents for the purposes of appeal.

*O'Rourke v. United States* (1st Cir. 1957), 248 F. 2d 812; (Cert. denied), 356 U. S. 922;

*Bandy v. United States* (8th Cir. 1960), 278 F. 2d 214, 364 U. S. 477, Judgment vacated and remanded;

*State v. Lewis* (1960), — Wash. —, 349 P. 2d 438.

To say that such a classification may be made is not the same as saying that it may be made with no basis in rationality other than the fact of an individual's poverty. The classification must be founded on reason to escape the proscription of the equal protection clause.

*Cash v. United States* (D.C.C.A. 1958), 261 F. 2d 731.

The ultimate rationality in any judicial system creating a sifting or screening process for indigent appeals is to protect the Appellate Courts from becoming overburdened with frivolous appeals taken at public expense. There is also an attendant policy against the harassment of public officials who must resist such appeals.

It is Petitioner's position that the mere fact that Indiana has classified indigents and non-indigents is not a denial of equal protection, as the classification is imbued with the quality of reasonableness. Therefore, the question that arises is whether the process created by Indiana law would deny an indigent possessing a meritorious claim an adequate appellate review. The argument thus shifts from equal protection to "fairness" or "due process".

See: *Appellate Review for Indigent Criminal Defendants in the Federal Courts*, 26 U. Chi. L. Rev. 454.

The above interpretation does not run afoul of the Supreme Court decisions cited in the District and Circuit Courts' decisions below. (R. 54 and R. 76)

*Griffin v. Illinois* (1956), 351 U. S. 12, *Burns v. Ohio* (1959), 360 U. S. 252, and *Smith v. Bennett* (1961), 365 U. S. 708, were all cases where the sole factor precluding appellate review was the defendants' indigency. There was no attempt made on the part of any of the states there involved to sift non-meritorious appeals of indigents. A denial of equal protection in these cases does not require such a conclusion in the present cause. The classification is as shown above made on the basis of a rational state policy, and not an arbitrary one of indigency.

In *Eskridge v. Washington State Board of Prison Terms and Paroles* (1958), 357 U. S. 214, the Supreme Court held that the State of Washington denied Appellant therein, an indigent, his constitutional rights under the Fourteenth Amendment by conditioning his appeal on the approval of the trial judge. While the language in *Eskridge* is not without ambiguity, Petitioner submits that it is just as rational to interpret the holding in terms of "*due process*" as "*equal protection.*" The Court was not saying that the classification itself was unconstitutional, but it was done in such a way as to operate unfairly on indigent defendants. To impose on a trial judge the burden of deciding upon the merits of an appeal is to work an unfairness on an indigent. The judge must overrule a motion for a new trial and in the next breath agree that justice will thereby be served by allowing defendant an appeal. The quite natural distaste with which a trial judge views an appellate reversal argues against cloaking him with the power to initiate the appellate process. However, in the case of the Public Defender in Indiana, the argument cuts the other way. The Public Defender in this case has represented the potential Respondent in the lower court. If error has been committed, he will have a vested interest in seeing that it

is corrected. Where any appealable error is noted, he is not likely to shrink from raising it on appeal.

It is submitted that the opinion of the Public Defender, as to a meritorious cause, comes closer to a reasonable substitute for adequate appellate review than does that of the trial judge.

*Eskridge* is distinguishable from the present case on yet another ground. The Appellant in *Eskridge* was seeking a review of his original conviction. No appellate review court had ever looked at the facts surrounding his conviction. In this cause, Respondent had a full review of his original conviction.

*Brown v. State* (1958), 239 Ind. 184, 154 N. E. (2d) 720.

Such a review for indigents, as well as non-indigents, has been long held to be a constitutional right in Indiana.

*McCrary v. State* (1961), — Ind. —, 173 N. E. (2d) 300;

But see *Willoughby v. State* (1961), — Ind. —, 177 N. E. (2d) 465.

An appeal from a denial of a Writ of Error Coram Nobis on the other hand has been held by the Supreme Court of the State of Indiana to be a matter of grace.

*McCrary v. State* (1961), — Ind. —, 173 N. E. (2d) 300.

Petitioner is aware of the fact that similar arguments have been dismissed or obliquely criticized in other cases.

*Smith v. Bennett* (1961), 365 U. S. 708;

*Barber v. Gladden* (1957), 210 Ore. 46, 298 P. 2d 986, 309 P. 2d 192.

It is respectfully submitted that where a state had created certain post-conviction remedies whereby a convicted man may test the constitutionality of his conviction, in the case of indigents, it has the right to call a halt to the indiscriminate appeal from the denial of such remedies. To hold otherwise, at least as the law now stands in Indiana, would be to allow a convicted man to bring endless appeals from frivolously filed writs in the lower courts.

Petitioner, therefore, submits that on the grounds of due process or fairness, *Eskridge* is distinguishable from the present case.

Petitioner further submits to this Court that the entire process of screening non-meritorious appeals from indigent defendants in Indiana is not a denial of due process.

What is the unfairness of which Respondent complains and the District and Circuit Courts below affirmed? Respondent had counsel at his hearing on his Petition for Writ of Error Coram Nobis. His attorney reviewed the record and advised him that there was no merit to an appeal. Thus far, Respondent is in no different position than is a man of wealth, whose attorney has advised him likewise. Here, however, their positions change. A non-indigent can buy a transcript and appeal *pro se*. He must appeal *pro se* because presumably he would not be able to procure an attorney to prosecute a frivolous appeal. To decide that a non-indigent could obtain an attorney would be to presume that the decision of his attorney, as to merit, was erroneous and inferentially that the Public Defender's decision was likewise erroneous. It would seem only logical, in discussing the constitutionality of a given state network of laws, as they bear on an individual, to presume that the laws work as they are supposed to and not to

presume their malfunction. There has, to date, been no showing that there was any merit to Respondent's appeal, and that the Public Defender's decision was in error. The decisions of the courts below necessarily presume error in the decision of the Public Defender.

The distinction then between Respondent and a man of wealth is that the latter could, by himself, face the Supreme Court of Indiana with a non-meritorious appeal. It hardly seems that the denial of this privilege by the State of Indiana is such as to amount to a "denial of fundamental fairness, shocking to the universal sense of justice," *Betts v. Brady* (1942), 316 U. S. 455, 462, or "implicit in the concept of ordered liberty." *Palko v. Connecticut* (1937), 302 U. S. 319, 325.

The United States Supreme Court has recently clarified the procedure in the Federal Courts for appellate review of convictions of indigent defendants.

> *Coppedge v. United States* (1962), — U. S. —, 82 S. Ct. 917.

*Coppedge* clarifies the earlier decisions of *Johnson v. United States* (1957), 334 U. S. 521; *Farley v. United States* (1957), 354 U. S. 521; and *Ellis v. United States* (1958), 356 U. S. 674. In *Coppedge*, the initial determination, as to the frivolity of an appeal, after the District Court has found a lack of "good faith", lies with the Circuit Court and is made on the basis of the certificate of the District Judge and "what is usually the *pro se* pleading of a layman." *Coppedge v. United States, supra*, at page 921. If, from the face of the papers filed, the indigent Appellant's appeal is not clearly frivolous, the Court of Appeals is to grant an appeal in forma pauperis. The Court then goes on to say at page 921:

> "* * * If, on the other hand, the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant both with the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed with the appeal *in forma pauperis* should be allowed. If, with such aid the applicant then presents any issue for the court's consideration not clearly frivolous, leave to proceed *in forma pauperis* must be allowed."

The Court of Appeals thus appoints an attorney to show whether there is any error in the District Judge's certificate. Presumably, if this court-appointed attorney says there is no error, that is the end of it. In Indiana, the Legislature has built into its system of post-conviction appeals such an attorney. When he says there is no merit to an appeal, that is the end of it. Granted in all cases he does not say this directly to the Supreme Court of Indiana, as the attorney appointed, according to *Coppedge,* relates his determination to the Circuit Court, but its practical effect on the indigent Appellant is the same. He has not received the same review as an Appellant who could afford to buy a transcript. In *Coppedge,* the Supreme Court apparently saw no denial of due process to an indigent just because his treatment was not the same in all particulars to a non-indigent. It is respectfully submitted that the lack of equivalence of treatment between indigents and non-indigents in Indiana likewise does not deprive a non-indigent of fundamental fairness.

The Public Defender's decision in Indiana is not always unreviewable. His decision not to appeal has been reviewed by issuing him a show cause order in two cases: once on remand from the Supreme Court of the United States, *McCrary v. State* (1961), — Ind. —, 173 N. E. (2d) 300; and once on a Petition for Rehearing on a Writ of Mandate filed, seeking to have the trial court ordered to provide Petitioner with a transcript. *Willoughby v. State* (1961), — Ind. —, 177 N. E. (2d) 465. Such a review was not provided Respondent in this case.

> *Brown v. State* (1961), — Ind. —, 171 N. E. (2d) 825.

The Supreme Court has never stated their reason for issuing a show cause order to the Public Defender, but apparently the order is to review an alleged dereliction of duty by the Public Defender.

> *Jackson v. Reeves* (1958), 238 Ind. 708, 153 N. E. (2d) 603.

Such review, as is granted by the Supreme Court of the Public Defender's decisions, shows that the Public Defender works under the watchful eye of the Supreme Court, and in a very real sense, acts as an arm of the highest court in Indiana. He is appointed by the Supreme Court of Indiana, and they fix and pay his salary.

> Indiana Acts of 1945, Ch. 38, Secs. 1 to 6, p. 81, as found in Burns' Indiana Statutes (1956 Repl.), Sections 13-1401 to 13-1406, *supra*.

## CONCLUSION

Indiana has attempted to establish an equitable system for allowing indigent defendants an appeal from the denial of post-conviction writs, while at the same time balancing the interests of the State against frivolous writs filed at State's expense. It is admitted that this procedure, like any human procedure, is not perfect. But it is strongly contended that the imperfections are not so fundamental as to violate the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Petitoner respectfully submits that this Court reverse the decision of the court below, and remand the case to the District Court of the Northern District of Indiana to hear the remainder of allegations in Petitioner's Writ of Habeas Corpus.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

**No. 283**

WARD LANE, as Warden of the Indiana State Prison,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA EX REL.,
GEORGE ROBERT BROWN,
*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENT.

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## BRIEF FOR RESPONDENT.

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### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The rules of the Supreme Court of Indiana, in part, are necessary to an understanding. Under this heading there is set forth portions of Rule 2-6 and Rule 2-40 of the Indiana Supreme Court as taken from that Court's opinion in *McCary* v. *State of Indiana*, ..... Ind. ....., 173 N. E. (2d) 300, at p. 307:

Rule 2-6 of this court, 1958 Edition, provides, in relevant part:

"There shall be attached to the front of the tran-

script, immediately following the index, a specific assignment of the errors relied upon by the appellant in which each specification of error shall be complete and separately numbered."

Rule 2-40 of this court, 1958 Edition, provides, in relevant part:

> "An appeal may be taken to the Supreme Court from a judgment granting or denying a petition for a writ of error coram nobis. The sufficiency of the pleadings and of the evidence to entitle the petitioner to a vacation of the judgment will be considered upon an assignment of error that the finding is contrary to law. The transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the clerk of the Supreme Court within ninety (90) days after the date of the decision. The provisions of the rules of this court applicable to appeals from final judgments shall govern as to the form and time of filing briefs."

## QUESTION PRESENTED.

Whether Indiana denied Respondent, an indigent convicted prisoner, the equal protection of its laws as required by the Fourteenth Amendment to the United States Constitution by a procedure for appeal from denial of a post-convictional remedy (Writ of Error Coram Nobis) under which:

(a) Any non-indigent convicted prisoner may appeal to the Supreme Court of Indiana as a matter of right by purchasing and filing a transcript, and

(b) Respondent could not have such appeal because the Public Defender refused to represent him or furnish the transcript which Respondent could not afford.

## SUMMARY STATEMENT OF CASE.

### Introduction to Summary Statement.

The facts of this case include both the events in which Respondent was directly involved and the state of the law, that is, the processes governing appeals in Indiana. Expository statements about the laws of Indiana concerning appeals are, in a real sense, a part of the "facts" in this action. In order to have the facts brought together in a single statement, we have chosen to include our own presentation under the heading STATEMENT. We also believe that a full and careful statement may be found in the opinion of the Court of Appeals below (R. 76-80).

### A. What Happened to George Robert Brown?

George Robert Brown, Respondent, was convicted and condemned to death (R. 11). Upon appeal, the decision in the trial court was confirmed (R. 11). A petition for a Writ of Certiorari to the Supreme Court of the United States was denied (R. 11). Thereafter, a petition for a Writ of Error Coram Nobis in the trial court was denied (R. 13). The Public Defender of the State of Indiana refused to assist the Respondent in an appeal from such denial (R. 13). A petition for the appointment of counsel and the providing of a transcript was denied in the trial court (R. 13). A petition for Writ of Mandate in the Supreme Court of Indiana to direct the trial court to provide counsel and transcript was denied (R. 13). Certiorari was sought in the Supreme Court of the United States and denied (R. 14). A petition for a Writ of Habeas Corpus was filed in the Federal District Court for the Northern District of Indiana (R. 14). The Court below ordered that the State of Indiana be given ninety days (or such longer time as it might upon application estab-

lish as necessary) to provide the Respondent with the appeal, up to that time, denied to him (R. 65). After the ninety days had passed, at Respondent's request, the District Court required the State to report what action it had taken (R. 65-6). The State reported to the District Court below that an affidavit had been filed by one of its Deputy Attorneys General with the Supreme Court of Indiana under the number and in the cause in which Respondent had filed for a Writ of Mandate informing that Court of the existence of the Habeas Corpus proceedings and the order of the District Court, to which affidavit a copy of the District Court's order was attached. The response further stated that, except for such filing, no action had been taken by the State of Indiana (R. 67). The Court of Appeals affirmed the decision below and the State filed its petition for Certiorari in this Court.

## B. What Is the State, the Condition of Relevant Law of Indiana?

Indiana's Public Defender Statute (P. Br. 2-4).

"Petitioner concedes that if Respondent has sufficient funds he could buy a transcript of the hearing in his Coram Nobis Writ in the Lake County Criminal Court. If he could not secure counsel, he could at least appeal *pro se*" (P. Br. 13).

The Public Defender is not "authorized to order a transcript at public expense for prisoners whom he does not represent." (*Willoughby* v. *State* (1961), ..... Ind. ..... : 177 N. E. (2d) 465, at 470.)

"Decisions of the Indiana Supreme Court have made it clear that where an indigent desires to take an appeal from an adverse decision in a post-conviction remedy, such as coram nobis, he must first obtain the assistance of the Public Defender" (P. Br. 11).

With respect to a post-conviction remedy, the right of appeal may be accorded by the State upon such terms as it may determine proper. (*McCrary* v. *State* (1961), Ind. ; 173 N. E. 2d 300, at 304, 305.) Coram Nobis is a post-convictional remedy, civil in nature, and the indigent prisoner cannot as a matter of right have a transcript furnished him at public expense (*McCrary* v. *State* (1961), Ind. ; 173 N. E. (2d) 300, at 305).

"A prisoner may represent himself, but if he does so he is bound by all of the rules of procedure in this jurisdiction" including furnishing of a Bill of Exceptions and a transcript. (*McCrary* v. *State* (1961), Ind. ; 173 N. E. (2d) 300, at 306, 307).

The failure to furnish a specific assignment of errors and a transcript, as required respectively, by Rules 2-6 and 2-40 of the Supreme Court of Indiana is jurisdictional, and the Court, in their absence, "is without jurisdiction to determine the questions which he has attempted to raise" (*McCrary* v. *State* (1961), Ind. ; 173 N. E. 2d 300, at 307).

## SUMMARY OF ARGUMENT.

Our argument consists of an effort to summarize the State's argument and to answer its important elements. During the course of this portion of the argument we will seek to develop that the Respondent's case is not, in any substantial way, distinguishable from the leading cases in the field and that Indiana's procedure as depicted in the State's brief does not fulfill constitutional requirements. In a second section of argument we shall seek to present affirmatively a case for the Respondent in which we will point out not only what was denied to Respondent and the opportunities that Indiana had to furnish Respondent with a full appellate review, but seek as well

to develop the weaknesses which appear in *Willoughby* v. *State of Indiana* (1961), ..... Ind. ....., 177 N. E. (2d) 465. As we have indicated already, it would appear that the *Willoughby* case attempts to add to the indigent prisoner's right to seek the help of the Public Defender, some sort of check on the work of the Public Defender in cases in which he refuses this assistance.*

Basically, the State's case fails because the State's system of appeals has failed to grant the equal protection which the Fourteenth Amendment to the Constitution requires. The State's brief attempts to equate the view of the Public Defender as to the merit or frivolity of an indigent's case with the opinion and judgment of the highest court in Indiana on the non-indigent's case. The highest court in Indiana has sought to establish that it maintains some form of supervision over the Public Defender and that it will in a proper case (without ever defining what is a proper case) look into the Public Defender's exercise of discretion. This, however, is done without offering the indigent prisoner any opportunity to have the record of his case before the court, and is a procedure wholly different and not in any sense the equivalent of the full appellate review which the non-indigent prisoner has as a matter of right.

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* But compare *Macon* v. *Orange Circuit Court* (1962), ..... Ind ....., 185 N. E. (2d) 619.

# ARGUMENT.

## INTRODUCTION TO ARGUMENT.

It is difficult to come to grips with the State's argument because it is curiously elusive. The State uses all the right words and mentions all the right cases, but does not meet the constitutional problem squarely. This view has dictated the form of our argument. We shall endeavor to answer the various parts of the State's argument in the sequence in which these parts are presented, with one exception, whether they deal with statements of fact, statements of principle, premises, or argumentative material. We will then set out a brief for the Respondent.

After many hours of seeking to determine in what way the State's argument is elusive and difficult to deal with in an organized fashion, a view of that argument which we believe to be correct is possible to state. It is our submission that *Willoughby* v. *State* (1961), Ind. ; 177 N. E. (2d) 465, represents, in effect, an admission by the Supreme Court of Indiana that the mere presence of a Public Defender, and his consideration and decision as to whether an indigent prisoner shall have an appeal, is not constitutionally tenable. *Willoughby* v. *State* (1961), Ind. ; 177 N. E. (2d) 465, adds something to the process which Indiana provides, but this is not presented or argued or adopted by the Attorney General. The State's Brief goes no further than to indicate, by suggestion and implication in the material on page 21, that this is an available part of the Indiana procedure. The Attorney General does not, at any point, attempt to argue that this adds anything to Indiana's process from a constitutional point of view.

## A. ANSWER TO STATE'S "ARGUMENT."

### 1. Summary of State's Argument.

It is submitted that the following is a fair summary of the State's argument:

(1) Indiana's classification of indigents and non-indigents for purposes of appeal, is permissible if founded on reason, and

(2) The classification is imbued with reasonableness since it is designed to protect Appellate Courts from becoming overburdened with frivolous appeals at public expense and to protect public officials from harassment.

(3) The opinion of the Public Defender, as to a meritorious cause, is an adequate substitute for an appeal to the Supreme Court of Indiana and does not deprive an indigent of fundamental fairness.

(4) Such review as is provided by the Supreme Court of Indiana of the Public Defender's decision shows that the Public Defender works under the watchful eye and acts as an arm of the highest court in Indiana, but the State does not make the argument stated as a conclusion in *Willoughby* v. *State of Indiana* (1961), Ind. , 177 N.E. (2d) 465, at 472.

### 2. How the State Has Argued.

It is submitted that the State has:

(a) Unduly restricted the significance of *Griffin* v. *Illinois* (1956), 351 U. S. 12; *Burns* v. *Ohio* (1959), 360 U. S. 252; *Smith* v. *Bennett* (1961), 365 U. S. 708.

(b) Distinguished *Eskridge* v. *Washington State*

*Board of Prison Terms and Paroles* (1958), 357 U.S. 214, by an unsound argument.

(c) Relied upon an unwarranted assumption that lack of merit in Respondent's case should be presumed.

(d) Introduced *Coppedge* v. *United States* (1962), U.S. , 82 S. Ct. 917, for what it does not mean.

(e) Attributed unspecified weight to what is alleged to be a part of the Indiana appeals process, a part which admittedly was withheld from Respondent, which comes into operation by unspecified means at unspecified times and which, when used, is ineffective to render valid that which preceded it.

### 3. The State's Argument Considered.

#### (a) Griffin,[1] Burns,[2] and Smith v. Bennett.[3]

The State disposes of *Griffin*, *Burns*, and *Smith* in short order. It says that they deal with indigency solely and not with a method of sifting out non-meritorious appeals of indigents.

A distinction which is not based on real substance and meaning cannot hold off the force and pressure of these authorities. These cases do not treat of minor statutory technicalities, but with an important constitutional clause. They are not routine cases dealing with problems arising out of the passing trivia of a changing and developing society.

These cases, when combined with *Eskridge* v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U.S. 214, apply a constitutional measuring stick to the

1. *Griffin* v. *Illinois* (1956), 351 U. S. 12.
2. *Burns* v. *Ohio* (1959), 360 U. S. 252.
3. *Smith* v. *Bennett* (1961), 365 U. S. 708.

treatment of appeals of indigent prisoners in a test of one aspect of our progress toward fulfilling the goal of Equal Justice Under Law.

Significance of this caliber has been attached to these cases, as one has succeeded the other in decision, by this Court itself. These cases call upon the several States to re-examine their established procedures and to change them, as change is required, in order to give to individual members of our society some larger part of that which the great promises of our Constitution lend hope can be achieved.

An interesting legal tactic can distinguish the cases. But such a device will not turn them awry nor will their potent language lose the name of action in this cause.

*Griffin* v. *Illinois* (1956), 351 U.S. 12, enunciated the primary guide-lines for situations of this sort. This is demonstrated by two excerpts. At page 18:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. * * * But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discrimination." (Citations omitted).

and at page 19:

> "There can be no equal justice where the kind of trial

> a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

Invidious discrimination dies hard. Distinctions without substance were immediately seen and urged and, with equal speed, dispatched. In *Burns* v. *Ohio* (1959), 360 U.S. 252, the facts are different. They can be distinguished from *Griffin* v. *Illinois* (1956), 351 U.S. 12, and Ohio argued the distinctions. *Griffin*, it was argued, was a first appeal; *Burns*, a second appeal, the first having been provided.

The Court speaking of this distinction says at page 257:

> "This is a distinction without a difference for, as Griffin holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty • • • . This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellant procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency" (Citations omitted).

A second distinction was urged. In *Griffin* v. *Illinois* (1956), 351 U.S. 12, the appeal was a matter of right; in *Burns* v. *Ohio*, (1959), 360 U.S. 252, a matter of discretion. To this the Court said at pages 257-258:

> "Since Griffin proceeded upon the assumption that review in the Illinois Supreme Court was a matter of right, • • • Ohio seeks to distinguish Griffin on the further ground that leave to appeal to the Supreme Court of Ohio is a matter of discretion. But this argument misses the crucial significance of Griffin. In Ohio, a defendant who is not indigent may have the Supreme Court consider on the merits his application for leave to appeal from a felony conviction. But as that court has interpreted § 1512 and its rules of practice, an indigent defendant is denied that opportunity. There is

> no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio."

and added at page 259:

> "• • • • Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."

In *Smith* v. *Bennett* (1961), 365 U.S. 708, invidious discrimination was rooted out in the face of distinctions urged, but rejected by this Court, as is partially recognized by the State (P. Br. 17). It was in this opinion that the following language was used:

> "The gist of these cases is that because '(t)here is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants,' *Burns* v. *State of Ohio*, *supra*, 360 U.S. at pages 257-258, 79 S. Ct. at page 1168, '(t)here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,' *Griffin* v. *People of State of Illinois*, *supra*, 351 U.S. at page 19, 76 S. Ct. at page 591, and consequently that '(t)he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.' *Burns* v. *State of Ohio*, *supra*, 360 U.S. at page 258, 79 S. Ct. at page 1169."

The State has seen the narrow and separate significance of each of these cases, but has failed to catch their gist.

They do not merely represent a decision on a single set of facts, but are the expression of a standard of constitutional requirement. Whatever Indiana or any other State

does with respect to appeals by indigent prisoners succeeds if it meets the standard, fails if it does not.

We are now at the single exception to answering the State's brief in its exact order. On page 14 of Petitioner's brief there is set out language taken from the concurring opinion of Mr. Justice Frankfurter in the *Griffin* case (p. 24). This language has been widely quoted, and it is of some interest to notice that a similar thought is expressed in the last paragraph of the principal opinion in that case at page 20, in *Burns*, at page 258, and in *Eskridge* v. *Washington*, at page 216. The words of Justice Frankfurter are quoted as supporting the Indiana process. To make this use of the language is to do violence to the words of this quotation and to the other suggestions of the Court referred to above. The State uses the language almost as though the words of Justice Frankfurter can be employed in the following manner: classification is permissible and Indiana has classified indigents and non-indigents, for the reason that it does not wish its appellate courts overburdened. Q.E.D.

This is not what Justice Frankfurter says and is not what he implies. He says that " * * * modes for securing a review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process" *(p. 24). If this language is taken to mean that the various States are free to develop systems governing indigent appeals which fulfill the requirements of the standard of the *Griffin* case, then the language takes on significance. The standard of the *Griffin* case requires that the mode employed does not "bolt the door to equal justice" or, as it is expressed in *Eskridge*, the mode must provide "an adequate substitute for the right to full appellate review". Other language in Justice Frankfurter's concurring opin-

* *Griffin* v. *Illinois* (1956), 351 U. S. 12, 76 S. Ct. 585 (p. 24).

ion, makes it perfectly evident that it was not his view that a process which did not meet the standard would be constitutional. At page 24, Justice Frankfurter said:

> "The State is not free to produce such a squalid discrimination. If it has a general policy of allowing general appeals it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope."

In this case the Petitioner is bound to show that the Indiana system, based upon classification, nevertheless, meets the constitutional standard. In this, we submit, the State has failed.

**(b) Eskridge v. Washington State Board of Prison Terms and Paroles.**

*Eskridge v. Washington State Board of Prison Terms and Paroles* (1958), 357 U. S. 214, was more troublesome to the State, which hit upon an unsound argument as a basis of distinction. The State says that to give a trial judge the burden of deciding upon the merits of an appeal works an unfairness on an indigent because the trial judge would view possible reversal with distaste. On the other hand, the State contends that the Public Defender, having represented the indigent prisoner in the lower court, would have a vested interest in seeing that his loss of the case was corrected. This is an odds-maker's argument. Is it not, considering the same persons, equally sensible, to argue that a trial judge finding that his decision is challenged would welcome the opportunity to permit an appeal, so his judgment could be affirmed? Is it not possible, also, that a Public Defender, having lost the case in the lower court would, fearful of exposure of his lack of capacity and ability, seek to permit the case which he lost to be buried rather than be reversed?

Neither the approach suggested by the State, nor the alternate which we have suggested, is sound or worthy of consideration. Both are based on guesses as to what might motivate this individual or that. Neither is an approach that furnishes a proper basis for fixing a constitutional standard.

Moreover, the State's argument reveals its own fatal weakness. It indicates that neither trial judge nor Public Defender, brings to this kind of task the objective attitude which must be present in anything denominated an appeal or "an adequate substitute" therefor.

A process which remains within the judicial system and relies upon the trial judge is found lacking in *Eskridge*. The Public Defender is neither a judge nor a judicial officer. He performs a ministerial function with effects upon individuals who have rights that can be tested only within the judiciary. It seems highly unlikely that a heavy responsibility, judicial in nature, should be entrusted to someone outside the judicial system in the case of the indigent, as long as appeals of the non-indigent are measured within the judicial system.

The essence of *Eskridge* is missed by the State. The Court says at page 216:

> "In *Griffin* v. *People of State of Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891, we held that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. We hold that Washington has denied this constitutional right here. The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript."

The key words are "an adequate substitute for the right of full appellate review." We submit that a Public Defender's conclusion is not an adequate substitute, particularly since a trial judge's conclusion has already been ruled out. The State's language in this regard is of some interest. Although later in the brief the State speaks more strongly, at this critical point in its argument, it does not claim, even verbally, that the Public Defender's opinion is "an adequate substitute for a full appellate review," but couches its clinching sentence in words that claim only that it "comes closer to a reasonable substitute for an appellate review than does that of the trial judge" (P. Br. 17).

**(c) Presuming Lack of Merit.**

Beginning at the middle of page 18, the State's brief proposes that the Courts below should not have presumed error in the decision of the Public Defender, or of the trial court upon denial of Respondent's Writ of Coram Nobis. The State proposes instead that there be substituted a presumption of no error. It would seem that the State thus achieves, in its brief, the very conclusion that Respondent believes is a matter for determination by the Supreme Court of Indiana. If this argument of the State were accepted, the State would have achieved a *tour de force*, indeed! This would be a very easy way to settle all questions in this field. With respect to indigents, we would presume that there was no error in the decision which denied them an appeal. If this is appropriate, we would then make the same presumption for the non-indigents. If this were appropriate, we could broaden our bases of operation and include not only indigent and non-indigent prisoners and criminal matters, but civil matters as well. We would, thus, solve the problem of overburdening our Appellate Courts, for by this single presumption we would have demonstrated that there is no need for them at all.

The argument must be wholly disregarded. We cite briefly from *Griffin* v. *Illinois* (1956), 351 U. S. 12, at page 16:

> "We must, therefore, assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript."

**(d) Coppedge v. U. S.**

When *Coppedge* v. *U. S.* (1962), ... U. S. ..., 82 S. Ct. 917, appeared in the advance sheets, Respondent's counsel expressed some chagrin that the case had not been available for use in the brief or argument of the instant case at the time it was docketed in the Court of Appeals for the Seventh Circuit. It was, then, a matter of amazement that the State, as appears from its brief, pages 19 and 20, not only gathered comfort from this case, but feels that it lends authoritative support to the State's position.

The conclusion which the State has expressed with respect to the *Coppedge* case is not what that case stands for, and the reasoning applied by the State will not stand critical scrutiny.

The question concerning indigents' appealing and the help that must be given to indigents in the terms of the *Coppedge* case are entirely different than what is required by the processes established in Indiana.

An indigent's application reached the Court of Appeals along with the certificate of a District Judge that says the applicant lacks "good faith." This Court then examined the situation and determined what must be done.

1. It recognized that the materials before the Court of Appeals at this stage, are generally inadequate for passing upon the application (p. 921).

2. If, despite the inadequacy of the materials, they reveal on their face, an issue for review which is not clearly frivolous, then leave to proceed as a pauper should be granted, counsel appointed and the Court of Appeals should "proceed to consideration of the appeal on the merits in the same manner that it considers paid appeals" (p. 921).

3. If, because of the inadequacy of the materials, the Court of Appeals can not determine the substance of the claims of the applicant, then the Court of Appeals must provide the applicant, counsel, and "a record of sufficient completeness to enable him to attempt to make a showing, that the District Court's certificate of lack of 'good faith' is in error" (pp. 921-2), and that leave to appeal as a pauper should be granted.

4. In the precise words of the Court:

> "If, with such aid, the applicant then presents any issue for the court's consideration not clearly frivolous, leave to proceed *in forma pauperis* must be allowed" (p. 922).

The State completely omits the fact that there are two requirements already expressed which are absent in the Indiana processes. The would-be appellant is permitted to bring with him "a record of sufficient completeness" to give him a chance to make a showing and he brings this record, with counsel, to the Court of Appeals. In Indiana, the record is not available for the indigent despite the fact that it is jurisdictional to the Supreme Court. In Indiana, the indigent is not in the Supreme Court and cannot have its judgment exercised on his case. The *Coppedge* case requires the presence of the indigent (legally) and his record in the Court of Appeals and requires that the discretion of that Court be applied to his claim and to his record.

The *Coppedge* case insists upon true equivalence for indigent and non-indigent; Indiana misses the mark.

**(e) Indiana's Mysterious Review**

Petitioner's brief contains, at page 21, a presentation concerning review of the Public Defender's decisions by the Supreme Court of Indiana. We are unable to determine what purpose the material is intended to serve, unless it is for justification of the claim in the last paragraph of that page to the effect that the Public Defender "works under the watchful eye of the Supreme Court, and in a very real sense, acts as an arm of the highest Court in Indiana."

The State surely does not intend to argue or even imply that Respondent has failed to exhaust all remedies offered to him by Indiana. *Brown* v. *State of Indiana* (1961), U. S. , 81 S. Ct. 1906, and *Brown* v. *State of Indiana* (1961), Ind. , 171 N. E. (2d) 825. To these citations we must add the admission by the State in these words, "Such review was not provided Respondent in this case" (P. Br. 21).

The particular kind of a review spoken of may have been foreshadowed by *Jackson* v. *Reeves* (1958), 238 Ind. 708, 153 N. E. (2d) 604, although this seems doubtful. The particular review referred to has been used twice. The first use occurred after remand from this Court in *McCrary* v. *State of Indiana* (1961), Ind. , 173 N. E. (2d) 300. The second use was made in an opinion dated October 24, 1961, exactly 90 days after the entry of the order by the District Court below granting Indiana a period of 90 days in which to provide the Respondent with the appeal that had been denied him. *Willoughby* v. *State of Indiana* (1961), Ind. . . . . , 177 N. E. (2d) 465.*

No one in Indiana knows how this form of review can be obtained, nor when it is available, nor upon what showing,

* But compare *Macon* v. *Orange Circuit Court* (1962), . . . . Ind. . . . . , 185 N. E. (2d) 619.

nor upon what terms (P. Br. 21). When granted, it is not a review which could be seriously offered as "an adequate substitute for the right of full appellate review."

Respondent will be content, at this point, with saying that the form of review discussed by the State appears designed to insure that the Public Defender will get "a fair trial" before the highest court of Indiana without offering to an indigent prisoner, already barred from that Court by the decision of the Public Defender, a hearing, even remotely equivalent to that which the non-indigent receives as a matter of right. This point will be more thoroughly covered under the next heading.

## B. THE CASE FOR THE RESPONDENT.

### 1. What Indiana Denied Respondent.

Respondent was denied a full appellate review of the denial of his petition for Coram Nobis. Any non-indigent could have had such a review. The non-indigent could have had the judgment and discretion of the highest court in Indiana exercised with respect to his claims of error as supported by the transcript of his case. The indigent Respondent has had the benefit only of the exercise of the judgment and discretion of the Public Defender. However learned, wise or able the Public Defender, it can hardly be claimed that consideration by him is constitutionally an adequate substitute for a full appellate review.

We submit this on the strength of the four (4) cases already invoked so often in this brief.

*Griffin* v. *Illinois* (1956), 361 U. S. 12.
*Eskridge* v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U. S. 214.
*Burns* v. *Ohio* (1959), 360 U. S. 252.
*Smith* v. *Bennett* (1961), 365 U. S. 708.

## 2. Indiana's Opportunities to Furnish Respondent With a Review.

The Respondent, having been refused the assistance of the Public Defender, sought the assistance of the trial court in his efforts to obtain counsel and his transcript. When this was denied, he sought the assistance of the Supreme Court of Indiana, using as a basis a Petition for a Writ of Mandate. This petition was denied (*Brown v. State of Indiana*, Ind. , 171 N. E. (2d) 825). He sought Certiorari in this Court. His petition was denied without prejudice to the application for a Writ of Habeas Corpus, which he made, and which has resulted in this cause (*Brown v. State of Indiana* (1961), U. S. , 81 S. Ct. 1906).

The review of which Indiana speaks in *McCrary v. State of Indiana* (1961), Ind. , 173 N. E. (2d) 300, and *Willoughby v. State of Indiana* (1961), Ind. , 177 N. E. (2d) 465, and in the brief of the State at page 21, was not granted to this Respondent.

After the Respondent's petition for a Writ of Habeas Corpus was filed in the United States District Court and as part of the order of that court, later affirmed by the Court of Appeals for the Seventh Circuit, and as a result of which the State filed the petition for Writ of Certiorari, resulting in this cause, the District Court granted the State of Indiana 90 days in which to give Respondent Brown a full appellate review of his Coram Nobis denial (R. 63). The State of Indiana took no action in response to the order of the District Court (R. 67). The State of Indiana has thus passed at least two full opportunities to furnish to Respondent Brown either a full appellate review or that which by the terms of *McCrary* and *Willoughby* and by the implication of the State's brief (page 21) is submitted as an adequate substitute for such full appellate review.

Indiana has not acted with respect to Respondent Brown. Indiana suggests in *McCrary* v. *State of Indiana* (1961), Ind. , 173 N. E. (2d) 300, and more forcibly in *Willoughby* v. *State of Indiana* (1961), Ind. , 177 N. E. (2d) 465, and implies in its brief (p. 21) that it now offers to indigent prisoners some kind of review which it believes to be the equivalent of the full appellate review that non-indigents receive as a matter of right.

Since Indiana has chosen not to afford Brown either the full appellate review or that substitute which it has granted to Willoughby and McCrary, how can the State be heard to complain now of the order of the Court below?

### 3. What the Respondent Would Have Had if the Review Said To Be Available in Indiana Had Been Granted to Him.

That which Indiana granted to McCrary and to Willoughby was withheld from Brown. Even if granted to Brown, the review granted to McCrary and Willoughby falls far short of fulfilling the requirements of the Fourteenth Amendment to the Constitution of the United States.

For purposes of the question raised in this cause, the *McCrary* case began in this Court. In *McCrary* v. *State of Indiana* (1960), 364 U. S. 277, 80 S. Ct. 1410, this Court vacated the order of the Indiana Supreme Court dismissing McCrary's appeal and remanded the cause to that Court using the following language:

> * * * Petitioner's attempted appeal to the Supreme Court of Indiana from a denial of relief in a post-conviction *coram nobis* proceeding was dismissed because of his failure to comply with rules of that court, requiring, *inter alia*, the filing of a transcript of the trial proceedings. He alleges that the dismissal denied him the equal protection of the laws because he was and is unable to pay for the preparation of such a

> transcript, see *Griffin* v. *People of State of Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891, and that although he attempted to avail himself of the services of the Indiana Public Defender, who is empowered to secure the preparation of such a transcript in paupers' cases, see Burns' Indiana Stats. (1956 Repl.), § 13-1401 et seq., that officer declined to assist him."

When the Indiana Supreme Court again took up the case of McCrary, it did pass on the allegations of McCrary as a petitioner in accordance with the directions of this Court, interpreting these allegations in the light of the law of Indiana and in the light of its own understanding of the *Griffin* case. *McCrary* v. *State of Indiana* (1961), Ind. , 173 N. E. (2d) 300.

In that opinion the Indiana Supreme Court, unfortunately, began its consideration of the remanded case with what appears to be an acute misunderstanding of the basic significance of *Griffin*. For example, the Court says at page 302:

> "In this State both the right of appeal from the conviction in any criminal case and from a judgment in any post-conviction proceeding are available to all persons who are unable to pay the cost of their appeal upon the same terms and conditions."

Later in the opinion, the Court points out that McCrary's proceeding had been considered under the same Rules as applied to all indigents' cases arising in the State and that this disposed of any danger that McCrary might have been denied "his full rights of due process" (page 302). This argument seems to creep into the State's brief at page 15.

The Indiana Supreme Court indicates that all paupers have equal rights in Indiana and proceeds to describe what it has caused to be done in response to the mandate from this Court.

This is what the Court did and required to be done:

Ordered the Public Defender to show cause "why he declined if he did decline or refuse, to provide a transcript for appellant (McCrary) or to assist him in the preparation of an appeal * * *" (P. 302);

The Public Defender filed his verified answer and return stating that McCrary did request his services and that the Public Defender personally interviewed McCrary; that he made a complete and thorough investigation of the case; that he found the facts to be (and these he sets out at great length); that the Public Defender finds that McCrary's confession was freely and voluntarily made and that McCrary's counsel at the trial was also of that opinion; that he feels the only possible defense would have been that of insanity, which McCrary refused to allow counsel to interpose; that appellant testified in his own defense and that his testimony substantially follows the confession; that the Public Defender attaches McCrary's confession as Exhibit "A"; that the Public Defender attaches as Exhibit "B" an affidavit of appellant's trial counsel stating, *inter alia*, that a brother of McCrary's thanked trial counsel for what he had done; that the Prosecuting Attorney gave McCrary every possible right and that he had a fair and impartial trial; that the Public Defender after investigation could find no basis for any post-conviction proceedings and he so informed McCrary; that after McCrary had filed *pro se* a petition for error coram nobis, which was dismissed, the Public Defender made an investigation of McCrary's charges in that petition; that he found them to be without foundation and that he refused to affect an appeal from the dismissal of the petition for writ of error

coram nobis; that McCrary makes twelve charges, which are summarized (pp. 302-4).

After this summary of what was done, the Supreme Court of Indiana states, "The facts and circumstances as shown by the record now before us show each and all of these allegations to be wholly without merit, and we deem it unnecessary to cite authorities or express the reasons for our conclusion" (p. 304).

In its opinion the Indiana Supreme Court puts forth a series of distinctions—that this is a post-conviction appeal which the State may offer upon such terms as it deems wise; that Indiana appeals at public expense, as a matter of right, are limited to appeals from a judgment of conviction; that coram nobis is a post-conviction remedy, civil in nature, and McCrary may not as a matter of right have a transcript furnished him at public expense for a judgment denying his petition for this right (pp. 304-6). All of these distinctions, we submit, have been wiped out by *Smith* v. *Bennett* (1961), 365 U.S. 708, 81 St. Ct. 895. At this point in the opinion the Supreme Court of Indiana says: "Having failed to secure the aid and services of the Public Defender to prosecute his appeal, appellant then attempted *pro se* to perfect an appeal to this court" (p. 306). The Court continues, in substance, that when a prisoner seeks to represent himself in an appeal from a judgment in a post-conviction proceeding, he is bound by all of the rules of the Court. Rules 2-6 and 2-40 are set out in the opinion (p. 307) and the Court continues in the following words:

> "Appellant's paper filed herein entitled, 'Appeal of Amended Petition for Writ of Coram Nobis' is, in fact and in substance, a brief * * *. It contains neither a proper assignment of errors nor a certificate of the judge or the clerk of the court as to the authenticity or genuineness of such parts of the record as are purported to be copied and submitted as a part of such

papers. There is no bill of exceptions containing evidence, nor are there any certified copies of the record in the trial court from which questions attempted to be raised by the appellant could be determined, as required by Rule 2-40, *supra*.

"The rules of this Court have the force and effect of law: (citations omitted); they are applicable to and enforceable against *all* without regard to economic status, race or creed (citation omitted).

"Because of the failure of appellant to comply with provisions of Rule 2-6, *supra*, and Rule 2-40, *supra*, this court is without jurisdiction to determine the questions which he has attempted to raise.

"For the foregoing reasons the attempted appeal herein is dismissed" (p. 307).

Before we discuss the meaning and significance of *McCrary*, we wish to present an analysis of *Willoughby* v. *State of Indiana* (1961), ..... Ind. ....., 177 N.E. (2d) 465. In *Willoughby* the Court is considering a petition for rehearing in an original action in which petitioner sought a Writ of Mandate compelling the trial court to furnish him with a transcript. The original petition had been denied. In much the same fashion as was true in *McCrary*, the Court gets a report from the Public Defender. The Court then denies the petition for Mandate, leaving *Willoughby* without his transcript. However, there is omitted from this decision the distinctions urged in *McCrary* and which *Smith* v. *Bennett* (1961), 365 U.S. 708, 81 S. Ct. 895, disallowed. The Court puts an exclamation point after the *McCrary* decision by saying at page 470:

"Under the facts here present (in the absence of any merit for appeal) the Public Defender had no authority to expend public funds for a transcript, therefore, he was justified in his refusal. In fact, when we consider the petition of the relator in the light of the reports filed by trial counsel and the Public Defender, we do not find any probable cause for appeal."

The Court specifically finds that no probable cause for appeal is shown to exist and concludes with the following language:

> "From common experience we know that a convicted defendant, who is financially able to do so, and therefore required by law to pay the costs of appeal, would not incur such costs against the advice of counsel who could find no error as cause for appeal unless, of course, such convicted defendant had personal knowledge of some specific error which he could *pro se* present to this court, contrary to the advice of counsel. By the same logic it is not reasonable to contend that equal protection under the law requires that the state must pay the cost of appeal for a poor person against the advice of counsel and in the absence of any showing of probable cause for appeal, merely because the convicted person is an indigent.
>
> Under our law which affords every accused person the right of asserting every available defense by competent counsel, with the opportunity (as in this case) of judicial review by this court over the action of such counsel, the state of Indiana has afforded to indigent defendants and non-indigent defendants alike, insofar as is reasonably possible, equal protection under the law in both the trial courts and on appeal" (p. 472).

Neither *McCrary* nor *Willoughby* answer the very simple objection to the Indiana process that the non-indigent prisoner may have his appeal regardless of the lack of merit, regardless of the frivolity. Neither of these cases answer the obvious objection that the non-indigent prisoner has an appeal based upon his record.

In these cases, McCrary and Willoughby become bystanders. In the last analysis, a reading of the *McCrary* case indicates that, under Indiana rules, he was not actually in court at any time, and, in both instances, the indigents, McCrary and Willoughby, were judged by some one else's record. This is exactly opposite to the right accorded every non-indigent.

If it were the practice of the Indiana Supreme Court to screen the appeals of non-indigents for lack of merit or frivolity, by this procedure it might well be that the indigent would be bound by the same rules.*

It would appear that the Supreme Court of Indiana is entrapped by the statutes with respect to the creation of the office of the Public Defender and by its own rules. The State is in a position in which it is impossible for it to grant equal protection to any indigent prisoner in the position of McCrary or Willoughby, or the Respondent Brown.

It should be noted that the Supreme Court of Indiana in the *McCrary* case actually says that McCrary is not before the court because he has come without a transcript. It does not matter how fair a trial the Public Defender receives nor how fair a trial the indigent's trial counsel receives, if the indigent prisoner himself is denied a full appellate review available to all non-indigents.

In *Willoughby* v. *State of Indiana* (1961) ..... Ind. ....., 177 N.E. (2d) 465, the Court cites a note in Vol. 36 of the Indiana Law Journal at page 237. While the note may leave much to be desired, it must be remembered that it was written shortly after *McCrary* was decided. It recognizes in the body of the note and in its conclusion the existence of a constitutional weakness in the Indiana Public Defender system and sets up warnings that Indiana may have to "ferret out and repeal or adjust existing laws which are not compatible" (p. 245) with the decisions of the Supreme Court of the United States. The article makes it clear that the *McCrary* decision (meaning the decision upon remand by this Court) may require the task to be faced immediately, and the article points to the weakness in the Indiana Public Defender system resulting from the decisions in

* *Coppedge* v. *United States* (1962) ..... U. S. ....., 82 S. Ct. 917, at 922-3.

*Griffin* v. *State of Illinois* (1956), 351 U.S. 12 and *Eskridge* v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U.S. 214.

In the article, Indiana's leadership through its Public Defender system is referred to and the article adds at page 245, "Leadership or prominence, however, are subject to decadence in a stagnant climate". The position of the State of Indiana, in this case seems mainly an effort to shore up "the stagnant climate" of the appellate processes governing indigent prisoners in Indiana.

It is submitted that had this kind of "review" been made available to Brown, the requirements of the Fourteenth Amendment of the Constitution of the United States would not have been met.

## CONCLUSION.

We have sought to find other ways of expressing the conclusion in order to avoid repeating the conclusion stated on behalf of the Respondent in the brief filed with the Court of Appeals for the Seventh Circuit. It has been determined to repeat that conclusion.

Frivolity is not indigenous to the indigent nor hope limited to the well-to-do. Our Constitution does not permit the frivolity and the hope of the financially able to march in through a door which opens to the Supreme Court of a State, unless that door is also open to the frivolity, if need be, and surely to the hope of the indigent.

Respondent respectfully submits that the decision of the Court below should be affirmed.

Respectfully submitted,

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